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In The
Supreme Court of the United States
October Term, 1983

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TONY AND SUSAN ALAMO FOUNDATION,
TONY ALAMO, SUSAN ALAMO, AND
LARRY LAROCHE,
Petitioners,

v.

RAYMOND J. DONOVAN, SECRETARY
OF LABOR,
Respondent.

____—o—____
**ON WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

____—o—____
**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

____—o—____
ROY GEAN, JR.
GEAN, GEAN & GEAN
First America Building
Suite 500, 524 Garrison Avenue
Fort Smith, Arkansas 72901-2519
501-783-1124

Attorneys for Petitioners

QUESTIONS PRESENTED

1. Is an individual an "employee" as defined by the Fair Labor Standards Act when he renders services to a religious or charitable organization on a voluntary basis with no expectation or desire of compensation or wages in any form as a result of such services?

2. Is an individual an "employee" as defined by the Fair Labor Standards Act because he volunteers his services to a religious or charitable organization if such services are rendered by others who receive compensation for the same services from other organizations?

3. Should the Fair Labor Standards Act and its provisions be applicable to a religious or charitable organization when it uses the services of volunteers?

4. Is the application of the Fair Labor Standards Act to the petitioners violative of the Free Exercise of Religion Clause and/or the Establishment Clause of the First Amendment to the United States Constitution?

5. Is the Secretary of Labor's attempted application of the Act to the petitioner a willful and oppressive denial of that equal protection of the law, which is secured to the defendants, as to all other persons, by the Constitution of the United States?

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OPINIONS DELIVERED BELOW

The opinion of the United States District Court for the Western District of Arkansas is reported at 567 F. Supp. 556 (1982) and is printed in its entirety in the Appendix attached hereto at pages App. 1-40. The opinion of

the United States Court of Appeals, Eighth Circuit, is reported at 722 F. 2d 397 (1983) and is printed in its entirety in the Appendix attached hereto at pages App. 48-63.

**FOUNDATIONS UPON WHICH JURISDICTION
IS INVOKED**

The opinion of the United States Court of Appeals for the Eighth Circuit was entered on December 5, 1983. (See Appendix, pages App. 48-63.) Both parties to this action filed timely petitions for rehearing, which were denied by Order of the United States Court of Appeals for the Eighth Circuit on March 1, 1984. (See Appendix, page App. 68.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

Constitutional Provisions

U. S. Const. Amend. I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U. S. Const. Amend. V. No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

Statutes

28 U. S. C. § 1291
 29 U. S. C. § 201
 29 U. S. C. § 203(e) (1)
 29 U. S. C. § 203(g)
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 29 CFR § 779.214

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Senate Report No. 145, 87th Cong. 1st Sess. (1961)
 reprinted in 1961 U. S. Code Cong. & Admin. News, 1620,
 1660.

Senate Report No. 1487, 89th Cong. 2d. Sess. (1966)
 reprinted in 1966 U. S. Code Cong. & Admin. News, 3027.

(Only citations for the above list of statutes, regulations, and other authorities are provided at this point; their pertinent text is set forth in the following Appendix.)

STATEMENT OF THE CASE

1. *Facts Material to the Consideration of Questions Presented.* The Tony and Susan Alamo Foundation was founded by the petitioner, Tony Alamo, and his wife, Susan Alamo, now deceased, and was incorporated under the laws of the state of California on January 29, 1969. Subsequent to its incorporation, the Foundation applied for, and received, a certificate of authority to conduct its affairs in the state of Arkansas. As set forth in its Articles, the express purposes of the Foundation are:

To establish, contain and maintain an Evangelistic Church; to conduct religious services, . . . to educate, ordain, support and appoint ministers, evangelists, missionaries and workers in connection therewith, . . . to build, equip and operate trade schools and workshops and co-ordinate with allied institutions. . . .

On December 18, 1974, the Foundation secured an exemption from taxation under § 501(c) (3) of the Internal Revenue Code as a corporation organized and operated exclusively for religious purposes with none of its net earnings inuring to the benefit of any private shareholder or individual. (See, Defendants' Exhibit 31 and *Memorandum and Order*, of the United States District Court for the Western District of Arkansas (hereinafter referred to simply as *Memorandum and Order*, para-

graph II, App. 2.) Such tax-exempt status has not been altered, amended, canceled, or revoked, but has been maintained since that time. (Tr. Vol. II, p. 197.)

As found by the District Court, the Foundation is "an outgrowth of the evangelistic efforts of Tony and Susan Alamo". (See, *Memorandum and Order*, App. 6.) The Foundation has established churches throughout the United States (Tr. Vol. II, p. 201), and sends individuals across the country to witness and testify about Christian principles and doctrines in rest homes, hospitals, reformatories, and detention centers. (Tr. Vol. II, p. 201.) The founder, Tony Alamo, contends that the Foundation is "the strongest soul winning work in the country". (Tr. Vol. II, p. 203.)

The Foundation's evangelical activities are performed by approximately three hundred individuals who are generally referred to as "associates". Prior to their association with the Foundation, most were addicted to or users of drugs or engaged in criminal activity. As found by the District Court, the work of the Foundation, through Tony and Susan Alamo, provided spiritual and moral assistance to these individuals. (See, *Memorandum and Order*, App. 7; Bill Levy, Tr. Vol. II, p. 71; Ann Elmore, Tr. Vol. II, p. 123; Ed Mick, Tr. Vol. II, p. 156-164.) The associates, however, are only a fraction of the people who have been converted, encouraged, or assisted by the Foundation. (Tr. Vol. II, p. 202.)

The associates can be distinguished from other individuals who are or were influenced by the Foundation's ministries in that they (the associates) desire to become evangelists or pastors and to "give their life to the Lord"

(Tr. Vol. II, p. 204), and in that they live on Foundation property. As stated by Tony Alamo, before these individuals are taken into the Foundation, they must "convince us without shadow of a doubt" that they "really want to become evangelists, . . . [or] pastors, [and] that [they] want to give their life to the Lord". (Tr. Vol. II, p. 204.)

Though the Foundation receives contributions from the public, it does not solicit them. (*See, Memorandum and Order*, paragraph XI, App. 8.) One source of income is the operation of the following:

<i>Activity</i>	<i>Type of Activity</i>	<i>Location</i>
Alamo Discount Grocery	Retail sales of groceries	Alma, AR
Alamo Construction	Construction	Alma, AR
Alamo Telegraph	Western Union	Alma, AR
Alamo Auto Repair	Vehicle repair	Alma, AR
Alamo Freight	Freight-trucking	Alma, AR
Alamo Ready-Mix	Ready-mix concrete	Alma, AR
Alamo Farms	Hog farms	Alma, AR
Alamo Roofing	Roofing construction	Alma, AR
Alamo Record Company	Production of records	Alma, AR
Forth-Smith Mobile Nursery	Landscaping	Alma, AR
Alamo DX	Service station	Alma, AR
Alamo Restaurant	Restaurant	Alma, AR
Alamo of Nashville	Retail sales of clothing	Nashville Tennessee
Tennessee Boy	Distribution	Nashville Tennessee

Other activities were listed in the District Court's Memorandum and Order; however, the majority were never in operation or were closed during the pendency of this action.

Though the annual gross volume of sales derived from the activities listed above exceeds \$250,000.00, the net operating result was, and continues to be, a loss. (Tr. Vol. II, p. 200.)

The Secretary contends, and the District Court held, that the above activities are a part of an "enterprise" within the meaning and definition of Section 3(v) of the Act, (29 U.S.C. § 203(v)) in that the Foundation operated the activities as businesses under common control for common business purposes. Despite the District Court's conclusion of "enterprise", it made the following findings:

The Foundation secured an exemption from taxation under 501(c) (3) of the Internal Revenue Code as a corporation organized and *operated exclusively for religious purposes with none of its net earnings inuring to the benefit of any private shareholder or individual.* (*See, Memorandum and Order*, para. II, App. 2, emphasis ours.)

The Foundation is an outgrowth of the evangelistic efforts of Tony and Susan Alamo. (*See, Memorandum and Order*, para. X, App. 6.)

The petitioners contend that the above listed activities are merely extensions of the Foundation's ministries in that they provide the associates, who were addicted to drugs or engaged in criminal activity, a forum for rehabilitation, and a forum for spreading their religious beliefs. Consequently, each separate activity is viewed by the associates as a "church in disguise". In addition, these activities serve the needs of the associates. For example, the restaurant provides, without charge, meals to the associates and their families, as the clothing store freely provides clothing. Many of the activities, though labeled "commercial enterprises" are operations maintained sole-

ly for the benefit of the associates. One such operation is the "Alamo Sewing Room", which was found by the District court to be a business. The "Alamo Sewing Room" was described, however, by one of the associates as follows: "[T]hat was a sewing bee, like a sewing circle. Women got together; my wife participated in it went down there and sewed clothes for my little boy, and things like that." (Tr. Vol. II, p. 193)¹

The Secretary of Labor contends that these activities are related and are conducted for a common business purpose and thus comprise an "enterprise" as defined by Section 3(r) of the Fair Labor Standards Act. 29 U.S.C. § 203(r). The petitioners maintain that these activities were created and are operated exclusively for religious purposes. Notwithstanding the Secretary's position, these activities have been accepted by the Internal Revenue Service as activities related to the Foundation's exempt (religious) purpose. (Tr. Vol. II, p. 202)

The overwhelming majority of the work performed in the operation of these activities is done by the associates. Most of the associates' time, however, is spent in religious activity such as reading the Bible, witnessing, and testifying. (Tr. Vol. II, p. 73; Tr. Vol. II, pp. 127-128; Tr. Vol. II, p. 165.)

The associates testified at trial that they consider their association with the Foundation to be ministerial training. (Tr. Vol. II, p. 205.) Furthermore, the associates consider their services in the operation of these activities

¹This is the only evidence presented to the District Court that described the nature of the "Alamo Sewing Room".

to be on a voluntary basis, without expectation or desire of wages or compensation in any form. (Tr. Vol. II, p. 100; Tr. Vol. II, p. 135; Tr. Vol. II, p. 175.)

As found by the District Court: "The Secretary failed to produce any past or present associate of the Foundation who viewed his work in the Foundation's various commercial businesses as anything other than 'volunteering' his services to the Foundation." (*See, Memorandum and Order*, App. 7.)

The associates do receive benefits from the Foundation in the form of lodging, meals, medical care, clothing, furnishings, and child care.

The Secretary of Labor contends, and the District Court so held, that the associates are "employees" as defined by the Fair Labor Standards Act. The petitioners contend (1) that the associates are not covered by the Act, and (2) that any attempted application would be constitutionally prohibited as well as improper.

2. *Procedure Below.* (Including Basis for Federal Jurisdiction) On December 19, 1977, in the United States District Court for the Western District of Arkansas, the Secretary of Labor initiated an action against the Tony and Susan Alamo Foundation, Tony Alamo and Susan Alamo (its officers and founders), and Larry LaRouche, an associate of the Foundation, allegedly in accordance with Section 17 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 217, for alleged violations of Sections 6, 7, 11, and 15 of the Fair Labor Standards Act (29 U.S.C. §§ 206, 207, 211, and 215).

Other than the petitioners, the alleged violations concern two groups of individuals. The first group is com-

posed of eighteen individuals who were undeniably employees as defined by the Act. These individuals were from "outside" the Foundation and were hired to render specific services. The members of this group throughout the trial were referred to as "outside workers". The question involving this group was whether the wage received by the "outside workers" was sufficient to meet the minimum wage and overtime provisions of the Fair Labor Standards Act. (Tr. Vol. I, p. 12.) The second group is comprised of approximately three hundred individuals who live on Foundation property and who call themselves volunteers. As stated above, the word "associates" was, and is, used to identify the members of this group. (See, *Memorandum and Order*, App. 6, footnote 2.) The Secretary of Labor contends that back wages totaling approximately nineteen million dollars (\$19,000,000.00) are due the associates.

On December 13, 1982, and several months following the actual trial of this case, the District Court entered its decision in a forty page *Memorandum and Order*. With regard to the "outside workers", the District Court found overtime compensation violation in the amount of pay due nine of the eighteen "outside workers". (See, *Memorandum and Order*, App. 29-34.) The petitioners were ordered to pay these nine individuals the sum of \$14,087.86. As to the "associates", the Trial Court found them to be "employees" as defined by the Fair Labor Standards Act, and directed the defendants and the Secretary to supply each associate with written notice advising "any associate who desires to submit a claim for back wages to submit a claim in the form of an affidavit within 45 days of mailing of the notice. . . ." (See, *Memorandum and Order*, App. 39.)

The claim would be reduced by the value of the applicable benefits (e. g., lodging, board, etc.) received by each associate. (See, *Memorandum and Order*, App. 40.) On December 23, 1983, the petitioners, seeking the reversal of the orders entered below, filed a *Notice of Appeal* in the United States Court of Appeals for the Eighth Circuit in accordance with the Federal Rules of Appellate Procedure. On January 13, 1983, the respondent filed *Plaintiff's Motion for Clarification and Amendment of Memorandum Decision and for Entry of Judgment*. The District Court granted said *Motion*, entered an *Order* modifying the aforesaid *Memorandum and Order*, and entered a *Judgment*. The petitioners accordingly refiled their *Notice of Appeal*, and the respondent filed his *Cross-Appeal* seeking a restitutionary injunction.

After considering the parties' Briefs and after hearing oral argument, the United States Court of Appeals for the Eighth Circuit on December 5, 1983, filed its opinion wherein the District Court's *Order* of December 13, 1982, was vacated and remanded, in part, for determination of the amounts of wages due the associates; such determination to be based either upon the present record or on the record supplemented by such additional evidence as the District Court may afford the parties an opportunity to offer.

Petitions for rehearing were timely filed by both parties, and both were denied as set forth in the *Order* of the Court of Appeal for the Eighth Circuit entered and filed on March 1, 1984.

REASONS FOR THE ALLOWANCE OF WRIT

(Rule 17 of the Rules of the Supreme Court)

1. *Decision in Conflict with Decisions of Federal Courts of Appeals and with a Decision of this Court.*

The decision of the United States Court of Appeals for the Eighth Circuit in this case is in conflict with the decision of the United States Court of Appeals, Second Circuit, rendered in the case of *Rogers v. Schenkel*, 162 F. 2d 596 (1947); with the decision of the United States Court of Appeals, First Circuit, rendered in the case of *Turner v. Unification Church*, 602 F. 2d 458 (1979); and with the decision of the United States Supreme Court rendered in the case of *Walling v. Portland Terminal Co.*, 330 U.S. 148, 67 S. Ct. 639, 91 L. Ed. 809 (1947).

As noted above, at all times relevant to this action, there were approximately three hundred (300) individuals associated with the defendant Foundation, who were referred to as "associates". The salient issue in this case is whether the associates are "employees" as defined by the Fair Labor Standards Act.

Pursuant to the District Court's pre-trial order of March 20, 1982, the petitioners called three associates to testify concerning their relationship with the Foundation, with the understanding and agreement that their testimony would be representative of all the associates of the Foundation.² (Tr. Vol. I, pp. 9-11.) The Secretary of

²DISTRICT COURT: Why don't you pick out two or three of them, and we will assume that if the ones whose statements

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Labor was given the opportunity to call any associate who would testify differently from the three representative associates. (Tr. Vol. I, p. 9.) The three who testified in such representative capacity were Bill Levy, Ann Elmore, and Edward Mick. (Tr. Vol. II, pp. 70-194.) (Other associates testified; however, their testimony concerned other aspects of this action.)

After hearing their testimony and after reading the depositions of several former associates, the District Court found:

The Secretary of Labor failed to produce any past or present associate of the Foundation who viewed his work in the Foundation's various commercial businesses as anything other than "volunteering" his services to the Foundation.³

Typical of the associates' attitude about the Secretary's efforts in their behalf is that of Ann Elmore. Mrs. Elmore testified convincingly that she considered her work in the Foundation's businesses as part of her ministry. She views the businesses as a vehicle for preaching, witnessing, and testifying in support of religious beliefs of those associated with the Foundation. She does not work for the Foundation for material rewards; she does it in furtherance of God's command to spread the gospel. Mrs. Elmore said that she never expected any compensation from the Foundation, and the thought of receiving wages for her work is "vexing to my soul".

³Some of the witnesses who testified by deposition were former associates who had become disillusioned

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were furnished testified on that issue they would testify the same way. How will that be, Mr. Fitz? COUNSEL FOR SECRETARY OF LABOR: I don't suppose there would be any problem with that, Your Honor. DISTRICT COURT: Mr. Fitz, if you find some among that group you think would testify to the contrary, of course, you are free to call them. (Tr. Vol. I, p. 9.)

with the Foundation and Tony Alamo. Nevertheless, at the time they were at the Foundation and working in its business, they considered themselves "volunteers" of their services.

The Fair Labor Standards Act defines the term "employee" to mean "any individual employed by an employer". (See, 29 U. S. C. § 203(e) (1).) The term "employ" is defined under the Act to include "suffer or permit to work". (See, 29 U. S. C. § 203(g).)

This Court, in the case of *Walling v. Portland Terminal Co.*, 330 U. S. 148, 67 S. Ct. 639, 91 L. Ed. 809 (1947), clarified the meaning of the phrase "suffer or permit to work", as follows:

The definition "suffer or permit to work" was obviously not intended to stamp all persons as employees. . . . [S]uch a construction would sweep under the Act each person who, without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit. But there is no indication from the legislation now before us that Congress intended to outlaw such relationships as these. The Act's purpose as to wages was to insure that every person whose employment contemplated compensation should not be compelled to sell the services for less than the prescribed minimum wage. *Id.* at 330 U. S. 152.

The case of *Turner v. Unification Church*, 473 F. Supp. 367, aff'm. 602 F. 2d 458 (1st Cir. 1979) applied *Portland Terminal* to a factual situation similar to the case at hand.³ In *Turner*, the District Court granted

³The *Turner* case and the case under review are similar as to the facts directly relevant to the issue discussed under

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the defendant's Motion to Dismiss, finding that the Complaint failed to state a claim upon which relief could be granted.

In her Complaint, the plaintiff, Shelley Ann Turner, alleged that she was forced to work long hours of compulsory service soliciting money and selling candies, flowers, and tickets for the Unification Church rallies. For these efforts she allegedly received no monetary compensation, but was provided with food and shelter. Viewing the allegations set forth in Turner's Complaint in their most favorable light, the Court, granting the defendants' Motion to Dismiss, stated:

[21] In order to be covered by the F. L. S. A., plaintiff must be an "employee" as defined by 29 U. S. C. § 203. That section defines the term employee cryptically: "any individual employed by an 'employer'." The term has been interpreted broadly, see *Rogers v. Schenkel*, 162 F. 2d 596 (2d. Cir. 1947), but an employee must still be a "person whose employment contemplated compensation". *Walling v. Portland Terminal Co.*, 330 U. S. 148, 67 S. Ct. 639, 91 L. Ed. 809 (1947). The plaintiff's Complaint indicates that she never contemplated any monetary or tangible compensation for the Unification Church. Certainly, Turner's services cannot be termed voluntary or gratuitous as she was allegedly being held in involuntary servitude.

. . .

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this point. The cases can be equated in that there was work performed in a "religious" setting, and that the individual worker expected no wages or compensation. The similarities of the cases do not extend to religious doctrine, to methods of "recruiting" individuals, or to beliefs regarding solicitation of money.

Despite the plaintiff's laudible desire "to create a better world," performing services for charitable purposes without expecting any tangible compensation does not give rise to an employer-employee relationship within the meaning of the F. L. S. A. Therefore, plaintiff cannot claim a cause of action under 29 U. S. C. § 216. *Id.* at 377.

It is well settled that a person who intends his services to be voluntary and to be rendered without compensation is not an "employee" within the meaning of the Fair Labor Standards Act. (*See also, Roger v. Schenkel, supra.; Bowman v. Pace Co., 1 WH Cases 119 (5th Cir. 1941).*)

In the case at hand, the District Court erroneously stated:

Although the associates expected no compensation in the form of ordinary wages, they did expect the Foundation to provide them food, shelter, clothing, transportation and medical benefits. (*See, Memorandum and Order, p. 6.*)

As in *Turner, supra.*, the associates did receive food and shelter; however, the representative associates testified that their efforts were not for material reward and were not given in expectation of benefits such as food and shelter.

With reference to the benefits he and his family received, Bill Levy stated:

[B]ut even if I didn't get such great benefits, I would still do what I am doing because it's my belief in the Almighty.

I've never expected any compensation, any wages, nor do I even expect to receive any compensation or

wages for what I do, for what I do for the ministry of God. (Tr. Vol. II, p. 100.)

When Ann Elmore was asked if she expected such benefits as food and shelter, she stated:

I didn't come in—I had gave up much more comfortable circumstances in the so-called world than I was coming into. But I was willing to do that. I didn't care if I never had another material thing as long as I lived. I wanted to do what was right in the eyes of God. . . . And no one expected any kind of compensation, and the thought is totally vexing to my soul. It would defeat my whole purpose. (Tr. Vol. II, p. 135, 136.)

Mrs. Elmore's "purpose" behind her work was not to receive compensation in any form, but was "to do what was right in the eyes of God".

The third associate to testify as a representative of the other individuals associated with the Foundation was Ed Mick. Mr. Mick made the following remarks regarding the alleged expectation of wages, compensation, or tangible benefits:

I have never ever had any expectations of compensation nor wages. When I came to this Church, I was dying. You couldn't put a dollar price on anything like that. I owe my life to the gospel and missionary field and the endeavors of spreading the gospel of this church. Nobody owes me anything. I am the one who owes.

Q. You don't expect compensation at this time?

A. I wouldn't even consider it.

Q. Do you expect compensation for some of your activities in the future?

A. Never ever. (Tr. Vol. II, p. 175.)

Though given the opportunity, the Secretary of Labor was unable to produce any associate who would testify that he or she expected wages or compensation in any form for their efforts. In this regard, the Secretary failed to meet his burden of proof. As stated in *Donovan v. William Chemical Company, Inc. d/b/a Dooly Oil*, 682 F. 2d 185 (8th Cir. 1982):

In determining whether hours are compensable, it is the duty of the court to look to the employment agreement to determine what the parties intended, and where that is impossible, to look to the circumstances to determine what was intended. *Id.* at 187.

The Secretary of Labor, through this action, is attempting to impose an employee-employer relationship upon the associates and the Foundation despite their express intent to the contrary. Is it the purpose of the Secretary of Labor to label all volunteer work "employment" so that work in any form or setting is subject to the Fair Labor Standards Act?

None of the associates⁴ claimed that they were entitled to wages in any form as a result of their labor. The Secretary of Labor, however, seeks to force the Foundation to pay wages to individuals who neither expect nor desire the same. As stated by the District Court in its *Memo-randum and Order* (App. 7-8), Mrs. Elmore's attitude was "typical of the associates' attitude about the Secretary's efforts in their behalf", and that to Mrs. Elmore, the

⁴Even with respect to former associates, the Trial Court found that at the time they were at the Foundation they considered themselves volunteers of their services. (See, *Memo-randum and Order*, footnote 3, App. 7.)

thought of receiving wages for her work is "vexing to my soul". (Tr. Vol. II, p. 135.)

This Court should also examine the nature of work performed by the representative associates. Mr. Levy, when describing what he did at the Foundation, stated:

I volunteer my services in whatever capacity I can be of use; I witness and testify; to go to church services; I seek baptisms with souls; I read with young Christians; I go out on the street and bring the gospel of love to people. . . . I go out on witnessing chains and bring the message to the lost and dying in convalescent hospitals and jails, on the street, witnessing and testifying, whatever. In whatever capacity I am, the main thing that I do is witness for the Lord Jesus Christ. (Tr. Vol. II, p. 73.)

Furthermore, Mr. Levy stated he volunteered his services on the Foundation's hog farm. (Tr. Vol. II, p. 77.)

Ann Elmore, in describing her activities with the Foundation, stated:

Well, my main and sole interest is to preach the gospel to other people who are like I was, that they may have that same thing, that they might be saved. So whatever I do,—the first four and a half or five years at the Foundation, I did nothing but read the Bible and pray. I'd go out in the streets and witness and testify. That was all I did the first five years. (Tr. Vol. II, pp. 127-128.)

Mrs. Elmore also stated: "I volunteered my time waitressing at our restaurant. And I loved working up there, because I was a witness for the Lord." (Tr. Vol. II, pp. 140, 141.)

Ed Mick made the following statements regarding his service for the Foundation:

I witness and testify. I go out on witnessing chains, hospital wards, intensive care wards, to the streets, the highways, the byways, pass out gospel literature, and compel people to come into the house of the Lord.

I do some other activities if I am needed, or if I see a place where I can volunteer my services, I cheerfully do so.

Yes, I have on occasions [worked at the restaurant]. I've gone in and fry cooked, wherever I could help out.

Tony Alamo described the character of the individual who is accepted by the Foundation and the purpose behind the individual associate's affiliation with the Foundation, as follows:

[W]e are not out to get people to come to the Foundation, to feed people. And those that volunteer, that say they really want to serve the Lord with all their heart, soul, and mind and body, that really want to become evangelists, that want to become pastors, that want to give their life to the Lord, then they have to convince us without a shadow of a doubt before we ever take them in. (Tr. Vol. II, p. 204.)

The associates did not desire or expect wages or compensation of any kind. The nature of their work tends only to support their statement that they volunteered their services.

Throughout the District Court's *Memorandum and Order*, the phrase "commercial businesses" is utilized. The District Court appears to focus its concern on those associates who worked in the Foundation's "commercial businesses". In paragraph V, App. 36, of the aforesaid *Memo-*

randum and Order, the Trial Court makes the following conclusions: "The people who worked in the Foundation's commercial businesses . . . are 'employees' of the defendants, Tony Alamo, Susan Alamo and the Foundation within the meaning of the Act." The District Court, however, should not have disregarded the voluntary nature of the associates' work simply because some of them might have worked in activities customarily considered "commercial". In the case of *Walling v. Portland Terminal Company*, *supra*, this Court found: "There is no question that these trainees do work in the kind of activities covered by the Act." 330 U. S. at 151, 91 L. Ed. at 812. Notwithstanding this finding, this Court held that the trainees were not employees under the Act as they performed services without promise or expectation of compensation.

In the case of *Rogers v. Schenkel*, *supra*, the United States Circuit Court of Appeals for the Second Circuit found that the plaintiff "performed work in interstate commerce for the defendants" and that "his services were those of a helper doing plating work". *Id.* at 597. The Second Circuit, however, also found that the plaintiff intended his services to be rendered without compensation. Accordingly, and in light of the *Portland Terminal* case, the Second Circuit reversed the District Court's decision and found no basis for the legal conclusion that the plaintiff was an employee under the Fair Labor Standards Act.

Furthermore, in the case of *Turner v. Unification Church*, *supra*, it was found that the plaintiff "worked long hours—'often more than 12 hours per day' of 'compulsory service' soliciting money and selling such items as candy, flowers, and tickets for Church rallies". *Id.* at

371. For these efforts, the plaintiff received no monetary compensation but was provided with food and shelter. Despite such efforts in activities which could be labeled "commercial", the Court found no employer-employee relationship to exist.

Each of the above-cited cases deal with individuals working in "commercial" activities. Yet, in each case, the Court found the intent and expectations of the parties to be controlling. As stated in *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L. Ed. 124 (1944): "The law does not impose an arrangement upon the parties. It imposes upon the Courts the task of finding what the arrangement was." 323 U.S. at 137.

The intent and expectation of the associates are clear. As in *Turner*, the associates performed services for charitable purposes, and as in *Portland Terminal* and *Schenkel*, the associates did not contemplate, expect, or desire compensation for the services performed.

The decision of the Eighth Circuit in the case now under review is in direct conflict with this Court's decision rendered in *Walling v. Portland Terminal Co.*, *supra*, with the Second Circuit's decision rendered in *Rogers v. Schenkel*, *supra*, and with the First Circuit's decision rendered in *Turner v. Unification Church*, *supra*. It is interesting to note that despite these cases being so similar to the facts of the case at hand and notwithstanding the same being thoroughly argued in the parties' briefs, the Eighth Circuit in its decision made no mention of any of these cases.

2. Effect of Decision on Volunteerism in this Country and on Religious Freedom.

This decision of the Court of Appeals for the Eighth Circuit will have serious consequences on volunteerism

in this country. The District Court found (1) that each associate viewed his work as volunteering his services to the Foundation; (2) that typical of the associates' attitude was that the work done for the Foundation was not for material reward, but was in furtherance of their religious beliefs; and (3) that none of the associates expected any compensation. Despite these findings, the District Court, which was affirmed by the Eighth Circuit, found the associates to be "employees" as defined by the Fair Labor Standards Act and imposed the record-keeping, minimum wage, and overtime provisions of the Act upon the associates and the Foundation.

The effect of the decision is devastating to those who wish to *freely* give of their services. This decision ignores the desires of this charitable organization as well as those of the volunteers who consider even the thought of receiving wages for their labor to be "vexing" to their souls. Practically every person in this country volunteers his services in some way. As noted in S. J. Ellis & K. H. Noyes, *BY THE PEOPLE, A HISTORY OF AMERICANS AS VOLUNTEERS* (1978):

The few research studies done on the extent of participation in volunteer work have considered only participation in formalized or organized volunteering. For example, the Census Bureau conducted a survey for ACTION, concluding that in the year ending April 1974, a total of 36,812,000 Americans volunteered. This meant that 24% of the population, or one out of every four citizens over the age of 13, did organized volunteer work that year. This was an increase over the figure determined by a Department of Labor study in 1965. However, both of these surveys admitted to touching only the tip of the volunteer iceberg. . . . When one adds to the available statistics the

amount of "informal" or "unaffiliated" volunteering, the numbers soar to include just about everyone. (pp. 227-228)

The Secretary of Labor, through this case, is expressing his position that volunteerism is an encroachment on his "territory". This position is based upon the belief that volunteers handle jobs that someone could be paid to do. He argued that an unfair advantage over competitors would be created in favor of the Foundation and other similar religious and charitable institutions if volunteers are excluded from the provisions of the Fair Labor Standards Act. Though this may occasionally be true, it does not justify imposing the terms of the Fair Labor Standards Act upon volunteers and upon organizations utilizing volunteers. This argument must be rejected in light of *Walling v. Portland Terminal Co.*, *supra*.

Not only is this argument contrary to the holding in *Portland Terminal*, but it has no support in the record as the only evidence comparing the activities of the Foundation with businesses outside the Foundation shows the Foundation's prices to be higher. (Deposition, William J. Baxter, pp. 16, 17.)

Furthermore, the fallacy of this argument can easily be seen when one is forced to consider the church worker who drives the church bus to take the elderly to and from church services to be in competition with the local taxi companies. This argument also forces one to find competition between the local restaurants and the church cafeteria which supplies meals prior to a church service. The Secretary's argument leads to the conclusion that professional fund raisers are placed in an unfair position by

the volunteer who donates his time and effort to solicit pledges for the church budget. The landscaping companies are being deprived of business by the volunteer who freely gives his time and effort to maintain the landscaping around church buildings. Because of this "unfair advantage" or "competition", the Secretary attempts to justify application of the Act to traditionally charitable and religious settings.

In short, the imposition of the aforesaid Act and its regulations upon the Foundation and its activities will quickly lead to the demise of this Christian effort. In addition, it will open the door for the Secretary of Labor to impose such burdensome financial and recordkeeping requirements upon other Christian ministries, which will inevitably hinder and restrain their religious and charitable efforts. It is common knowledge that charitable and religious organizations and their projects or programs exist only because of volunteer help. Furthermore, such programs and projects typically involve activities that could be considered "commercial". Yet, up until this case, such have not been burdened with government regulation through acts such as the Fair Labor Standards Act.

The decisions below will drastically affect the nature and availability of the volunteer work force. In addition, these decisions create serious First Amendment concerns. For example, one inevitable result is the entanglement of heavy government regulation with religious activity. Furthermore, in light of the fact that volunteers for most charitable organizations render services for which other individuals may receive compensation and the fact that the Secretary has applied the Act sparingly (and indeed has apparently refused to apply the Act to particular re-

ligious or charitable groups), one is forced to conclude that the Secretary is guilty of discriminatory application of the Act. The importance and impact of this decision warrant the granting of the petitioners' request for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

CONCLUSION

WHEREFORE, petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the decision of the United States Court of Appeals for the Eighth Circuit in Raymond J. Donovan, Secretary of Labor, United States Department of Labor v. Tony and Susan Alamo Foundation, Tony Alamo, Susan Alamo, and Larry Larouche. In the event that the Petition is granted, petitioners pray that the decision of the Court below be reversed.

Respectfully submitted

GEAN, GEAN & GEAN
First America Building
Suite 500, 524 Garrison Avenue
Fort Smith, Arkansas 72901

By ROY GEAN, JR.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

NO. CIV 77-2183

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR

Plaintiff,

vs.

TONY AND SUSAN ALAMO FOUNDATION, ET AL.,
Defendants.

MEMORANDUM AND ORDER

This is a suit by the Secretary of Labor seeking injunctive relief under the Fair Labor Standards Act. The Court has jurisdiction of the case as an action brought pursuant to 29 U.S.C. §217. Following an evidentiary hearing, the Court enters the following findings of fact and conclusions of law:

Findings of Fact

I.

The Tony and Susan Alamo Foundation was incorporated under the laws of California on January 29, 1969. In the Articles of Incorporation, the Foundation purports to be a nonprofit religious corporation with the primary purposes being to: "establish, conduct and maintain an evangelistic church, and generally to do those things needful for the promotion of Christian faith, virtue and charity."

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II.

The Foundation secured an exemption from taxation under §501(c)(3) of the Internal Revenue Code as a corporation organized and operated exclusively for religious purposes with none of its net earnings inuring to the benefit of any private shareholder or individual. The exemption has been approved and certified by the Internal Revenue Service.

III.

Since incorporation, the defendant Tony and Susan Alamo Foundation has owned or operated the following businesses in California since at least January 1, 1976:

Period of Time From To	Business Name	Type of Business	Location
		Contract labor crews	Saugus, CA
	Alamo Sewing Room	Manufacture of clothing	Saugus, CA
	Alamo on Vine	Retail Sales of clothing	Hollywood, CA
10/27/73 5/6/76	Alamo Exxon	Service station	Saugus, CA

IV.

Defendant Tony and Susan Alamo Foundation applied for, and received, a certificate of authority to conduct business affairs in the State of Arkansas. The Foundation has owned or operated the following businesses in Arkansas since April 10, 1975:

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Period of Time From To	Business Name	Type of Business	Location
1/ 5/71 Present	Hartford Advertising	Promotion of records	Alma, AR
6/ 1/71 Present	Alamo Record Co.	Production of records	Alma, AR
4/10/75 Present	Fort Smith Mobile Nursery	Landscaping	Alma, AR
6/15/75 Present	Alamo Shoppers Emporium	Sales of building materials	Alma, AR
7/ 7/75 Present	Alamo Kerr McGee	Service station	Alma, AR
7/29/75 Present	Alamo DX	Service station	Alma, AR
10/21/75 Present	Alamo Restaurant	Restaurant	Alma, AR
2/21/76 Present	Alamo Candy Co.	Production of candy	Alma, AR
	Fleetwood Candies	Distribution of candy	Alma, AR
		Contract labor crews	Alma, AR
	Alamo Petroleum		Alma, AR
	Alamo Sewing Room	Manufacture of clothing	Alma, AR
5/13/76 Present	Alamo of Nashville	Retail sales of clothing	Alma, AR
4/ 2/76 5/30/78	Alamo Bandito	Retail sales of clothing	Alma, AR
7/ 5/76 Present	Alamo Discount Groc.	Retail sales of groceries	Alma, AR
1/ 5/77 Present	Alamo Construction	Construction	Alma, AR

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Period of Time From To	Business Name	Type of Business	Location
3/14/77 Present	Alamo Telegraph	Western Union	Alma, AR
6/ 1/77 Present	Alamo Auto Repair	Vehicle repair	Alma, AR
1/20/78 Present	Southwest Business Management	Recordkeeping	Alma, AR
5/20/78 Present	Alamo Freight	Freight-trucking	Alma, AR
7/ 1/78 Present	Alamo Ready-mix	Ready-mix concrete	Alma, AR
10/20/78 Present	North Amer- ican Leasing	Leasing	Alma, AR
6/27/79 Present	Alamo Farms	Hog farms	Alma, AR
6/27/69 Present	Bosco Feed	Feed and farm supplies	Alma, AR
9/21/79 Present	Alma Electric	Electrical construction	Alma, AR
9/21/79 Present	Alamo Land Development	Real estate	Alma, AR
9/21/79 Present	Alamo Packing	Packing and storage	Alma, AR
9/21/79 Present	Alamo Plumbing	Plumbing	Alma, AR
9/21/79 Present	Alamo Quarries	Sand and gravel	Alma, AR
9/21/79 Present	Alamo Roofing	Roofing construction	Alma, AR

V.

The defendant, Tony and Susan Alamo Foundation, has owned or operated the following businesses in the State of Tennessee since September 1, 1974:

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Period of Time From To	Business Name	Type of Business	Location
9/ 1/74 Present	Alamo of Nashville	Retail sales of clothing	Nashville, T
10/15/74 Present	Nashville Today	Distribution of candy	Nashville, T
10/15/74 Present	Tennessee Boy	Distribution	Nashville, T

VI.

The Foundation has owned or operated the Tempe Towers Motel in Tempe, Arizona, since March 15, 1979.

VII.

The businesses owned or operated by the Foundation are ordinary commercial businesses which offer goods and services to the general public in competition with for-profit businesses. The workers in the businesses are engaged in interstate commerce or in the production of goods for interstate commerce, or are workers handling, selling or otherwise working on goods or materials which have been moved in or produced for interstate commerce. Since January 1, 1976, the Foundation has had an annual gross volume of sales made or business done of not less than \$250,000, exclusive of excise taxes at the retail level which are stated separately.

VIII.

Defendant, Tony Alamo, is a resident of Crawford County, Arkansas. He is President of the Foundation and he actively supervises and directs the affairs and operations of the Foundation. Since the incorporation of

the Foundation, Tony Alamo has acted directly or indirectly in the interests of the Foundation in relation to its employees and workers. Defendant, Susan Alamo, was a resident of Crawford County, Arkansas, until her death in April, 1982. She was Secretary and Treasurer of the Foundation and, at relevant times, she acted directly or indirectly in the interests of the Foundation in relation to its employees and workers.

IX.

At the commencement of this action in December, 1977, defendant Larry La Roche was a resident of Crawford County, Arkansas, and Vice President of the Foundation. He no longer holds that office. There is no substantial evidence that Mr. La Roche acted directly or indirectly in the interests of the Foundation in relation to its employees or workers in the Foundation's commercial businesses.

X.

The Foundation is an outgrowth of the evangelistic efforts of Tony and Susan Alamo. The affidavits¹ of the "associates"² of the Foundation provide persuasive evidence that the evangelistic work of the Alamos and/or the Foundation associates has provided spiritual and

1. Defendants filed affidavits of 155 people who, if called as witnesses by defendants, would have testified in accordance with their affidavits. The parties agreed that the affidavits could be accepted in lieu of oral testimony since most of the testimony is cumulative.

2. The term "associates" of the Foundation is the way most of the workers described their relationship with the Foundation.

moral assistance to many people who lacked direction or purpose in their lives and some who were addicted to drugs or engaged in criminal activity.

Practically all of the work performed in the operations of the commercial businesses owned or run by the Foundation is done by the associates under the direction or supervision of Tony Alamo and, until April, 1982, Susan Alamo. The associates apparently own no interest in the Foundation and their relationship to the Foundation is an informal one.

The associates are entirely dependent upon the Foundation for long periods, in some cases several years. The associates who worked in each of the Foundation's businesses were not considered by defendants to be employees, but rather were considered as volunteers, associates of the Foundation, or brothers and sisters of the congregation. These workers received room, board, medical care, clothing, furnishings, child care and small amounts of cash money from the Foundation.

The Secretary failed to produce any past or present associate of the Foundation who viewed his work in the Foundation's various commercial businesses as anything other than "volunteering" his services to the Foundation.³ Typical of the associates' attitude about the Secretary's efforts in their behalf is that of Ann Elmore. Mrs. Elmore testified convincingly that she considered her work in the Foundation's businesses as part of her ministry.

3. Some of the witnesses who testified by deposition were former associates who had become disillusioned with the Foundation and Tony Alamo. Nevertheless, at the time they were at the Foundation and working in its businesses, they considered themselves "volunteers" of their services.

She views the businesses as a vehicle for preaching, witnessing and testifying in support of religious beliefs of those associated with the Foundation. She does not work for the Foundation for material rewards; she does it in furtherance of God's command to spread the gospel. Mrs. Elmore said that she never expected any compensation from the Foundation and the thought of receiving wages for her work is "vexing to my soul."

Although the associates expected no compensation in the form of ordinary wages, they did expect the Foundation to provide them food, shelter, clothing, transportation and medical benefits. Several former associates apparently had the idea that if the Foundation's businesses were successful, they would all prosper.

XI.

The Foundation does not solicit contributions from the public. Its principal sources of income are from the operation of its commercial businesses and donations from its associates. A substantial number of associates work in the various businesses. Some associates work for "outside employers" at various times and turn their paychecks over to the Foundation. Others contract for various jobs, such as construction work, and turn the contract proceeds over to the Foundation. Some of the associates work at non-commercial jobs for the Foundation, such as cooks, nursery school attendants, school-teachers, etc., at the Foundation school.

The Foundation maintains no records of the hours worked by associates in its commercial businesses. The records which were "reconstructed" for this litigation do not accurately reflect the hours worked or jobs per-

formed by the associates and are of no benefit to the Court.

The Secretary has taken the position that an appropriate inference to be drawn from the evidence, in the absence of accurate records, is that all 300 associates worked 10 hours per day, 6 days per week. The figures of 10 hours per day, 6 days per week were elicited from former associates in response to leading questions on depositions. Some of the Secretary's witnesses, who were former associates of the Foundation, testified that work assignments were prepared for the associates and they were required to work as long as 12 to 15 hours per day, 6 or 7 days per week. One witness, Debra Malone, said she worked as long as 3 or 4 days at a time in the sewing room without sleep. In opposition to such testimony, defendants' witnesses testified there was no "scheduling" or "assignment" of work at the commercial businesses; that people just volunteered to work when they saw a need.

It is difficult to draw inferences with any degree of certainty, from the testimony presented, as to the number of associates working in commercial businesses or the hours they worked. First, there is no basis for concluding, as the Secretary suggests, that all 300 of the associates worked in the Foundation's commercial businesses. To the contrary, the evidence reflects that the associates have constructed, decorated and furnished a number of residences, an apartment building, a church, and various other structures used by the Foundation and its associates for non-commercial purposes. The labor for much of this construction and the continuing maintenance of the structures was furnished by the associates. As

previously mentioned, some associates work at the Foundation in non-commercial jobs, such as babysitting at the nursery, cooking for the other associates, etc. Furthermore, the Foundation produces a television show which obviously requires some non-commercial work time; some associates "witness" on the streets, in hospitals, jails and other places; and some help organize new churches. Additionally, some associates are employees of businesses other than the Foundation's and simply turn their paychecks over to the Foundation. In any event, while it is difficult to reach any reasonably accurate conclusion as to how many associates work in the commercial businesses at any particular time, it is not reasonable to conclude that all of the adult associates are working in the commercial businesses, or, that the ones who do work in the commercial businesses do so on the regular basis suggested by the Secretary.

Value of Benefits Furnished Associates

As previously mentioned, most of the associates of the Foundation are totally dependent upon the Foundation. This dependence extends, in some instances, for a period of years. In many respects, the Foundation is operated as a commune.

The defendants contend that if the associates are "employees" and thereby entitled to wages under the Act, the defendants should receive credit for the reasonable cost of benefits furnished the associates. See, 29 U.S.C.S. § 203(m).

The burden of establishing the "reasonable cost" of such benefits rests upon the defendants. As stated in

Donovan v. Williams Chemical Co., Inc., et al., No. 81-1999 at 8, (8th Cir. 1982).

"Section 3(m) of the Act, 29 U.S.C. § 203(m), allows employers to include the reasonable cost of providing meals, lodging, or other facilities in employee wages for purposes of the Act. The regulations promulgated by the Secretary define 'reasonable cost' 'to be not more than the actual cost to the employer of the board, lodging, or other facilities customarily furnished by him to his employees.' 29 C.F.R. § 531.3(a). "'Reasonable cost' does not include a profit to the employer or to any affiliated person.' *Id.* § 531.3(b). The regulations require employees to keep certain records of the cost incurred in furnishing board, lodging or other facilities, *id.* § 516.27(a), and also require the employer to maintain records showing additions or deductions from wages paid for board, lodging or other facilities on a work week basis. *Id.* § 516.28(b)."

The employer who claims a credit for the reasonable cost of providing board, lodging, or other facilities has the burden of segregating the permissible deductions from wages and impermissible deductions, i.e., the reasonable costs of meals, lodging, or other facilities from the total cost plus profit of providing them. *Donovan v. New Floridian Hotel, Inc.*, 676 F. 2d 468, (11th Cir. 1982) and cases cited therein. The specific guidelines for determining cost of food, lodging and other facilities are contained in Title 29 C.F.R. § 531.3. The guidelines will not be quoted in full, but the Court acknowledges and applies those guidelines in this case.

Defendants presented records purporting to show the actual cost of providing food, lodging and other facilities for the associates from 1976 through 1981. Obviously, the books were not maintained with a view toward "segregating the cost" of benefits provided the associates.

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There is a sufficient basis, however, for drawing reasonable inferences as to the actual costs. The books and records of the Foundation were subject to an extensive audit by the Secretary's investigators. Predictably, and consistent with the entire course of this litigation, the conclusions recommended by each side are poles apart. Defendants' exhibits 34-A and 34-B are representative of the contrast.

OVERALL BENEFITS RECEIVED PER MONTH PER ASSOCIATE
ACCORDING TO RECORDS OF THE TONY AND SUSAN ALAMO
FOUNDATION

(Defendants' Exhibit 34-A)

	1976	1977	1978	1979	1980	1981
BOARD	133.31	158.27	185.37	192.79	176.89	218.84
LODGING	451.74	413.23	448.21	433.47	426.54	463.25
TRANSPOR-	106.80	93.36	97.08	110.60	129.53	145.83
TATION						
CLOTHING	38.16	77.93	84.12	84.27	87.97	88.68
MEDICAL	6.27	13.18	8.69	8.20	8.56	11.37
UTILITIES	22.89	21.26	20.88	22.47	29.81	35.01
OTHER	134.93	105.73	122.03	147.43	136.00	163.80
RECREATION	.00	.00	7.30	7.41	12.58	13.50
TOTAL	894.10	882.96	973.68	1,006.64	1,007.83	1,140.28

OVERALL BENEFITS RECEIVED PER MONTH PER ASSOCIATE
ACCORDING TO DEPARTMENT OF LABOR

(Defendants' Exhibit 34-B)

	1976	1977	1978	1979	1980	1981
BOARD	12.05	41.27	50.52	48.62	41.01	57.31
LODGING	38.82	43.81	56.84	59.45	69.49	78.92
TRANSPOR-	.00	.00	.00	.00	.00	.00
TATION						
CLOTHING	6.15	9.01	8.17	7.55	10.26	4.58
MEDICAL	6.27	13.18	8.69	8.20	8.56	11.37
UTILITIES	10.15	6.61	7.32	6.39	4.89	5.03
OTHER	16.90	11.18	27.69	39.44	31.66	23.94
RECREATION	.00	.00	.00	.00	.00	.00
TOTAL	90.34	124.43	159.23	169.65	165.89	181.15

App. 13

While evaluating the benefits, the Court is mindful of the dispute existing between the parties regarding the quality of food, lodging and other facilities. Defendants characterize the benefits as those of the highest quality and plaintiff argues for the opposite extreme. The Court concludes the truth lies well within either extreme claimed. The photos and reliable descriptions of the housing suggest it is fairly typical of the average rental property available in the area. Some of the housing appears to be in excellent condition and well furnished, while other property is poorly maintained and ill furnished. The associates who appeared at trial certainly appeared healthy, well nourished and well clothed and there is no reason to believe the others are not.

In evaluating the benefits furnished the associates, the Secretary took issue with the purchase price and depreciation schedule figures used by defendants as representative of the defendants' "cost" of providing lodging. The Secretary concluded that fair rental value of the property used as housing was a more appropriate measurement, particularly with respect to the Arkansas properties. Accordingly, the Secretary hired a real estate appraiser for the purpose of determining a fair rental value of the properties. The defendants, although urging acceptance of the alleged cost price-depreciation method, did likewise. The Court concludes the rental value method suggested by the Secretary is the appropriate measurement for the Arkansas properties.

As a matter of explanation, the term "donated", which appears on the board schedules, generally refers to food furnished by the Foundation's restaurant, its food market or its distribution center. It is not always free food to

the Foundation. Similarly, references to "donated" on the transportation schedule refers to gasoline, repairs and maintenance of Foundation vehicles furnished by service stations or repair shops operated by the Foundation. There are, however, categories of "food donated" for some years where the food was apparently a gift from third parties. The distinction is noted in footnotes to the benefits schedules.

Benefits — 1976

In 1976, there was an average of 316 adult associates, according to Foundation records.

Plaintiffs' exhibit 49 is a schedule of benefits for 1976 which contains the cost value of benefits according to defendants. The amounts in each category accepted by the Secretary are indicated in red ink.

With respect to each category, the Court reaches the following general conclusions which also form the guidelines for the analysis of the benefits scheduled for subsequent years:

(1) Board—The figures claimed by defendant for Arkansas "Food Donated" from the restaurant are menu or related prices which should be reduced by 35% to more nearly reflect defendants' actual cost. The L.A. "food donated" is reduced by 20%. The Secretary's total disallowance of those figures was not satisfactorily explained. According to the Secretary, each associate was fed for \$2.78 per week. That amount does not include children, which reduces the figure below \$2 per week. Obviously, the Secretary's suggestion is in error or, at least, is not acceptable to the Court.

With respect to the "Food donated" items in the 1976 schedule, as well as the schedules for subsequent

years, the Court allowed 80% of grocery store donations, and 65% of restaurant donations since these figures were supported by persuasive evidence as the "cost" figures to the Foundation. The Court allowed 10% of the food donated from third parties as the cost of transporting, preparing and serving the food. The Foundation maintained a cafeteria which was operated at some "cost" to the Foundation.

(2) Lodging—The lodging figures are based upon the average fair rental value of the living quarters furnished the associates in Arkansas by the Foundation. The rental value is figured on the basis of furnished units. Also, such items as property tax, insurance, maintenance and repairs, etc., are included in the rental value. The figures are calculated so as to avoid duplication. For example, if utility costs are allowed elsewhere, they are not included in the rental value.

There is persuasive evidence that a portion of the Tempe property is used for living quarters full time by at least two associates and that other associates stay there periodically when traveling between Los Angeles and Alma. An allowance of 10% of the depreciated value of the Tempe property is made for that benefit furnished by the Foundation.

With respect to the California and Nashville property, the Court adopts the figures used by Mr. Gahm, the Secretary's auditor.

(3) Transportation—The Secretary refused to allow any sum for transportation despite convincing evidence that all of the transportation used by the associates was furnished by the Foundation. There is uncontradicted testimony that associates were transported to and from jobs, provided airplane tickets, taken for medical treatment, etc., all in Foundation vehicles or at Foundation expense. The Secretary's apparent objection to defendants' figures arises because the defendants included all vehicles, commercial or otherwise, in its transportation figures. The Sec-

retary's witness contended that "very few" of the Foundation's vehicles were appropriate for passenger use. The Court has examined the schedule of vehicles and equipment and concludes that approximately 50% of the vehicles are passenger type vehicles. Accordingly, the Court allows 50% of the documented expenses as transportation costs.

(4)Clothing—The defendants furnished evidence of the value of clothing furnished the associates. The Secretary objected to the value of the Arkansas and Nashville clothing, citing as one reason for the objection the fact that retail prices of clothing donated from the Foundation's stores were used and that the figures should be reduced by the 50% markup over actual costs. The Court agrees that the figures for clothing, which are not actual purchase prices, should be reduced. There is no evidence, however, which explains why the Secretary substituted figures for the Arkansas and Nashville amounts and, therefore, the Court accepts the Foundation's figures reduced by 50%.

(5)Medical—figures are documented amounts actually expended.

(6)Utilities—The Arkansas utility costs have been included in the cost of lodging. The remaining utility claims are actual figures. In some instances, the Secretary refused to allow the full amounts expended but there is no explanation for the reduction.

(7)Other—Much of the "Other" category claimed by the Foundation is duplicative of the rental value of lodging. Some of the categories, such as "legal", "Livestock supplies", "Office expenses, supplies", etc. appear to relate to Foundation activities and are not the type "benefit" contemplated by 28 U.S.C. §203(m). Since the defendants have the burden of establishing the cost to them of benefits furnished associates, the figures allowed by the Secretary are generally accepted by the Court.

The Court concludes the defendants established by a preponderance of the evidence an average cost/benefit for each associate in accordance with the following schedule:

1976

Benefit Schedule

	<u>Ark. Food Donated</u>	<u>Ark. Food Purchased</u>	<u>L.A. Food Donated</u>	<u>L.A. Food Purchased</u>	<u>Nashville Food Purchased</u>		<u>Average Per Mo. Per Associate</u>
Board	116,085.45 ¹	6,948.82	224,983.63 ²	29,661.30	9,095.00		102.00
	<u>Ark. Prop.</u>	<u>L.A. Prop.</u>	<u>Nashville</u>	<u>Tempe</u>			
	120,600	42,213.28	8,402.95	1,666.66			45.53
	<u>Ark. Purchased</u>	<u>Ark. Donated</u>	<u>L.A. Purchased</u>	<u>L.A. Donated</u>	<u>Nashville Purchased</u>	<u>Taxes and Insurance</u>	
Transp.	1,810.45	11,260.25	36,293.75	6,716.34	1,455.00	5,820.68	16.71
	<u>Ark.</u>	<u>L.A.</u>	<u>Nashville</u>				
Clothing	60,007.43	18,267.09	3,218.83				21.49
	<u>Ark.</u>	<u>L.A.</u>	<u>Nashville</u>				
Medical	12,415.51	10,957.27	391.05				6.27
	<u>Ark.</u>	<u>L.A.</u>	<u>Nashville</u>				
Utilities		39,805.02	10,496.83				13.27
	<u>Ark.</u>	<u>L.A.</u>	<u>Nashville</u>				
Other	74,716.18 ³						19.70
TOTAL AVERAGE BENEFITS PER MONTH PER ASSOCIATE -----							\$225.03

1. Allowed 65% of Arkansas food donated since there is no evidence it came from any source other than the restaurant.
2. Allowed 80% of L.A. food donated.
3. Allowed "Travel Expense" from other worksheet in addition to Secretary's figures.

Benefits — 1977

In 1977, there was an average of 385 adult associates of the Foundation. The following schedule of benefits was established by a preponderance of the evidence.

1977

Benefit Schedule

(Plaintiff's Exhibit 50)

	<u>Ark. Food Donated</u>	<u>Ark. Food Donated</u>	<u>Ark. Food Purchased</u>	<u>L.A. Food Purchased</u>	<u>L.A. Food Donated</u>	<u>Nashville Food Purchased</u>	<u>Average Per Mo. Per Associate</u>
Board	(Rest.) 248,255.00 ¹ (Groc.) 31,206.80 ²	17,000.00 ³	9,135.43	2,778.78	11,490.00 ³	15,555.72	72.60
	<u>Ark.</u>	<u>L.A.</u>	<u>Nashville</u>	<u>Tempe</u>			
Lodging	173,562.50	42,213.28	16,805.95	1,666.66			50.70
	<u>Ark. Purchased</u>	<u>Ark. Donated</u>	<u>L.A. Purchased</u>	<u>Nashville Purchased</u>	<u>Autos and Trucks</u>		
Transp.	4,621.20	26,356.72	4,063.89	4,892.08	-		8.64
	<u>Nashville Donations</u>	<u>Ark. Donations</u>	<u>L.A. Purchased</u>	<u>Ark. & Nashville Purchased</u>			
Clothing	3,000.00	11,965.96	27,162.17	2,513.50			9.66
	<u>Ark.</u>	<u>L.A.</u>	<u>Nashville</u>				
Medical	35,675.74	24,890.13	306.88				13.18
	<u>Ark.</u>	<u>L.A.</u>	<u>Nashville</u>				
Utilities	-	27,523.96	3,000.00				6.61
	<u>Ark.</u>	<u>L.A.</u>	<u>Nashville</u>				
Other	58,550.55 ⁴	-	-				12.67
TOTAL AVERAGE BENEFITS PER MONTH PER ASSOCIATE -----							\$174.06

1. 65% of Restaurant Food Donated
2. 80% of Grocery Store Food Donated
3. 10% of Other Food Donated - Cost of cafeteria, transportation and food preparation.
4. Allowed "L.A. maintenance and repair" in addition to amount allowed by Secretary.

Benefit Schedule

(Plaintiff's Exhibit 51)

	<u>Ark. Food Donated</u>	<u>Ark. Food Donated</u>	<u>Ark. Food Purchased</u>	<u>L.A. Food Purchased</u>	<u>L.A. Food Donated</u>	<u>Nashville Food Purchased</u>	<u>Average Per MO Per Associate</u>
Board	(Rest.) 202,603.95 ¹ (Groc.) 83,119.57 ²	16,917.00 ³	5,651.91	15,345.30	16,889.50 ³	15,009.29	83.46
	<u>Ark.</u>	<u>L.A.</u>	<u>Nashville</u>	<u>Tempe</u>			
Lodging	220,050.00	42,213.28	16,805.95	1,666.66			65.90
	<u>Ark. Purchased</u>	<u>Ark. Donated</u>	<u>L.A. Purchased</u>	<u>Nashville Purchased</u>	<u>Autos and Trucks</u>		
Transp.	2,117.54	48,423.90	15,221.80	1,876.03	-		15.88
	<u>Nashville Donations</u>	<u>Ark. Donations</u>	<u>L.A. Purchased</u>	<u>Ark. & Nashville Purchased</u>			
Clothing	29,126.10	17,300.14	5,346.38	12,173.81			15.01
	<u>Ark.</u>	<u>L.A.</u>	<u>Nashville</u>				
Medical	31,672.58	5,345.97	2.40				8.69
	<u>Ark.</u>	<u>L.A.</u>	<u>Nashville</u>				
Utilities	-	27,688.63	3,500.00				7.32
	<u>Ark.</u>	<u>L.A.</u>	<u>Nashville</u>				
Other	123,721.16 ⁴	-	-				29.04
TOTAL AVERAGE BENEFITS PER MONTH PER ASSOCIATE -----							\$225.30

1. 65% of restaurant food donated.
2. 80% of grovery food donated.
3. 10% of other food donated - cost of cafeteria, transportation and food preparation.
4. Allowed "L.A. maintenance and repair" in addition to amount allowed by Secretary.

Benefits — 1979

In 1979, there was an average of 347 adult associates at the Foundation. The following benefit schedule was established by a preponderance of the evidence.

1979

Benefits Schedule

(Plaintiff's Exhibit 52)

	<u>Ark. Food Donated</u>	<u>Ark. Food Donated</u>	<u>Ark. Food Purchased</u>	<u>L.A. Food Purchased</u>	<u>L.A. Food Donated</u>	<u>Nashville Food Purchased</u>	<u>Average Per Mo. Per Associate</u>
Board	(Rest.) 183,214.85 ¹ (Groc.) 75,165.07 ²	21,716.70 ³	8,168.40	18,115.50 ³	7,653.56	12,828.16	78.50
Lodging	<u>Ark.</u> 235,637.50	<u>L.A.</u> 42,213.28	<u>Nashville</u> 16,805.95	<u>Tempe</u> 1,666.66			71.16
Transp.	<u>Ark. Purchased</u> 6,268.97	<u>Ark. Donated</u> 44,452.06	<u>L.A. Purchased</u> 37,566.45	<u>Tempe Purchased</u> 465.82	<u>Nashville Purchased</u> 2,614.93	<u>Autos and Trucks</u> -	21.94
Clothing	<u>Nashville Donations</u> 2,600.13	<u>Ark. Donations</u> 13,865.35	<u>L.A. Purchased</u> 2,491.82	<u>Ark. & Nashville Purchased</u> 15,065.77			8.17
Medical	<u>Ark.</u> 27,483.77	<u>L.A.</u> 6,217.67	<u>Nashville</u> 431.14				8.20
Utilities	<u>Ark.</u> -	<u>L.A.</u> 25,059.26	<u>Nashville</u> 6,300.00	<u>Tempe</u> 536.08			7.66
Other	<u>Ark.</u> 187,267.71 ⁴	<u>L.A.</u> -	<u>Nashville</u> -	<u>Tempe</u> -			44.97
TOTAL AVERAGE BENEFITS PER MONTH PER ASSOCIATE -----							\$240.60

1. 65% of restaurant food donated.
2. 80% of grocery food donated.
3. 10% allowed on other food donated as cost of cafeteria, transportation and room preparation.
4. Allowed "L.A. maintenance and repair" in addition to amounts allowed by Secretary.

Benefits — 1980

In 1980, there was an average of 337 adult associates at the Foundation. The following benefit schedule was established by a preponderance of the evidence.

1980

Benefits Schedule

(Plaintiff's Exhibit 53)

	<u>Ark. Food Donated</u>	<u>Ark. Food Donated</u>	<u>Ark. Food Purchased</u>	<u>L.A. Food Donated</u>	<u>L.A. Food Purchased</u>	<u>Nashville Food Purchased</u>	<u>SWBM Food Donated</u>	<u>SWBM Food Purchased</u>	<u>Avg. Per Mo. Per Assoc.</u>
Board	195,019.50 ¹	25,420.12 ²	5,978.69	98,814.00 ²	2,534.96	11,874.23	7,415.31	34,622.79	94.36
	<u>Ark.</u>	<u>L.A.</u>	<u>Nashville</u>	<u>Tempe</u>					
Lodging	276,750.00	42,213.28	17,399.77	1,666.66					83.59
	<u>Ark. Purchased</u>	<u>Ark. Donated</u>	<u>L.A. Purchased</u>	<u>Tempe Purchased</u>	<u>Nashville Purchased</u>	<u>SWBM Purchased</u>	<u>SWBM Donated</u>		
Transp.	517.24	47,448.94	30,394.54	802.64 ³	4,687.76	24,979.82	14,327.12		30.45
	<u>Nashville Donated</u>	<u>Ark. Donated</u>	<u>L.A. Purchased</u>	<u>Ark. & Nashv. Purchased</u>	<u>SWBM</u>				
Clothing	3,577.19	6,690.86	2,310.72	33,059.47	2,294.68				11.85
	<u>Ark.</u>	<u>L.A.</u>	<u>Nashville</u>	<u>SWBM</u>					
Medical	31,769.97	1,639.16	704.11	500.00					8.56
	<u>Ark.</u>	<u>L.A.</u>	<u>Nashville</u>	<u>SWBM</u>	<u>Tempe</u>				
Utilities	-	19,891.37	7,075.48	3,294.17	329.04 ⁴				7.56
	<u>Ark.</u>	<u>L.A.</u>	<u>Nashville</u>	<u>SWBM</u>	<u>Tempe</u>				
Other	135,675.07 ⁵								33.55
TOTAL BENEFITS PER MONTH PER ASSOCIATE -----									\$269.92

1. Allowed 65% of restaurant food donated.
2. Allowed 10% of other food donated as cost of cafeteria, transportation and preparation.
3. Allowed all Tempe transportation.
4. Allowed 10% Tempe utilities.
5. Allowed "L.A. maintenance and repair" in addition to amounts allowed by Secretary.

Benefits — 1981

In 1981, there was an average of 314 adult associates at the Foundation. The following schedule of benefits was established by a preponderance of the evidence.

1981

Benefits Schedule

(Plaintiff's Exhibit 54)

	<u>Ark. Food Donated</u>	<u>Ark. Food Donated</u>	<u>Ark. Food Purchased</u>	<u>L.A. Food Donated</u>	<u>L.A. Food Purchased</u>	<u>Nashv. Food Donated</u>	<u>Nashv. Food Purchased</u>	<u>SWBM Food Purchased</u>	<u>SWBM Food Donated</u>	<u>56 Farm</u>	<u>Avg. Per Mo-Asso</u>
Board (Rest) (Groc)	182,048.75 ¹ 71,968.00 ²	20,347.13 ³	7,689.73	17,400.00 ³	1,918.90	10,186.46 ³	4,583.55	23,512.49	11,000.51	402.00	93.17
Lodging	<u>Ark.</u> 289,050.00	<u>L.A.</u> 42,213.28	<u>Nashville</u> 23,931.78	<u>Tempe</u> 1,666.66							94.71
Transp.	<u>Ark. Purchased</u> 2,128.26	<u>Ark. Donated</u> 52,940.27	<u>L.A. Purchased</u> 29,223.07	<u>Tempe Purchased</u> 686.00 ⁴	<u>Nashville Purchased</u> 2,706.82	<u>SWBM Purchased</u> 37,843.50	<u>SWBM Donated</u> 10,434.71	<u>Autos and Trucks</u> -			36.08
Clothing	<u>Nashville Donated</u> 3,036.31	<u>Ark. Donated</u> 10,420.21	<u>L.A. Purchased</u> 841.52	<u>Ark. Purchased</u> 2,614.87	<u>Nashville Purchased</u> 127,030.40	<u>SWBM</u> 3,371.84					39.10
Medical	<u>Ark.</u> 38,879.62	<u>L.A.</u> 2,331.87	<u>Nashville</u> 442.60	<u>SWBM</u> 1,197.14							11.37
Utilities	<u>Ark.</u> -	<u>L.A.</u> 13,219.37	<u>Nashville</u> 8,511.99	<u>Tempe</u> 429.63 ⁵	<u>SWBM</u> 8,017.62						0.01
Other	<u>Ark.</u> 90,201.28	<u>L.A.</u>	<u>Nashville</u>	<u>Tempe</u>	<u>SWBM</u>						23.94
TOTAL AVERAGE BENEFITS PER MONTH PER ASSOCIATE											<u>\$306.38</u>

1. Allowed 65% of restaurant food donated.
2. Allowed 80% of grocery food donated.
3. Allowed 10% of other food donated as cost of cafeteria, transportation and preparation.
4. Allowed all Tempe transportation.
5. Allowed 10% utilities at Tempe.

Outside Workers

The Secretary asserts claims in behalf of certain "outside employees"⁴ for overtime payments. The claims are made pursuant to Section 7(a) of the Act, which requires overtime compensation of one and one-half times the employee's regular rate of pay for all hours of work in excess of 40 hours during the workweek.

The Secretary's source of information upon which the claims are asserted consists of interviews of some of the employees, review of the payroll records (Px 4), computations of the Secretary's investigator, Rollin Shell (Px 18), and a summary of the computations (Px 19). Additionally, six of the fifteen employees for whom claims are asserted testified at trial.

None of the employees who testified made any affirmative claim for overtime payments. To the contrary, some of the witnesses stated that they had been paid all they were due and were not seeking additional pay.

Most of the claims for overtime pay result from Tony Alamo's penchant for paying the outside employees on the basis of a weekly salary. Although all of the weekly salaries were far in excess of the minimum wage rate, the employees generally worked more than a forty hour week. Any conclusions regarding entitlement of the employees to overtime pay requires the indulgence of inferences from sketchy information. Very frankly, the Court approaches this portion of the claim with little enthusiasm for several

⁴ "Outside workers" is the term applied to employees who work in the Foundation's commercial businesses who are not associates of the Foundation.

reasons. The Secretary's proof has little convincing force, particularly for those claims which were not supported by the testimony of the involved employee. At trial, the Secretary inexplicably doubled the amounts which had previously been claimed as overtime due. At least one claim, that for John Shasteen, was forcefully asserted by the Secretary until Mr. Shasteen testified at trial and the claim was withdrawn because of his testimony. Finally, the Court has the distinct impression that the employees who testified thought they were fairly treated and wanted no part of the claims.

In any event, the assertions of the Secretary demand some review and the Court reaches the following conclusions with respect to these individual claims:

1. John Brandon—He worked at the Alamo Transmission Shop for three different periods of time between October, 1978, and September, 1980. His hours were "about 7:30 or 8:00 a.m. until 5 p.m. with an hour off for lunch." His hours were kept "on the honor system"; he was free to leave the job if he needed to; and he thinks he "probably" worked "a little" more than 40 hours per week sometimes. He says he was paid "straight time" for all hours; that he was paid for every hour he worked; and "they don't owe me any money."

In reviewing the payroll ledger attached to Px 4, the Court concludes that Px 18 is an accurate summary of the hours worked per week and overtime due Mr. Brandon. The total pay divided by the hourly rate which Brandon was paid each week reveals the hours worked per week. The pay records used by defendant to compensate Brandon are a more reliable method for determining the hours he worked in 1978, 1979 and 1980 than his recollection at trial. Applying Section 7(a) to the figures produced by the payroll ledger dictates the conclusion that John Brandon is entitled

to \$815.69 as overtime pay improperly withheld by the defendant.

2. Dennis Cravens—Mr. Cravens did not testify at trial. The payroll ledger sheets indicate that Mr. Cravens was paid a weekly salary which was comfortably in excess of the minimum wage. The Secretary contends that occasionally Mr. Cravens drew more than his weekly salary and the Court should conclude that the excess payments were for overtime hours, which were paid at the regular hourly rate. After reviewing the ledger sheet, the Court concludes that the bare information provided is not a sufficient basis for reaching a "just and reasonable inference" that Cravens is entitled to overtime pay under Section 7(a).

3. Ronald Dickenson—Mr. Dickenson did not testify. The records alone are not sufficient to support a "just and reasonable inference" that he is entitled to overtime pay under Section 7(a).

4. Howard Floyd—Mr. Floyd was employed as an equipment operator at an hourly rate of \$8 per hour. He made an average of \$430 per week. The usual workweek was 60 hours per week. He was paid time and a half for all hours over 48 hours, but not for the hours between 40 and 48. He thinks he lost \$32 per week by missing overtime for the hours between 40 and 48. He said Alamo "paid me good" and he didn't know what the overtime law provided and "didn't care".

The matter of overtime due Mr. Floyd under Section 7(a) is based upon simple calculations from Px 4. The summary prepared by Rollin Shell as Px 18 is accurate. Defendant improperly withheld \$2,135.00 in overtime pay from Mr. Floyd.

5. Oscar Gamez—Mr. Gamez did not testify. The payroll ledger indicates that he was paid a weekly salary of \$240 per week for a 60 hour week. When he worked less than 60 hours, which is, of course, a frequent occurrence in the construction business, his pay was reduced at the rate of \$4 per hour. The Sec-

retary argues that Mr. Gamez's regular rate of pay is \$4 per hour and that he is entitled to time and a half for all over 40 hours. If Sections 778.108, 778.109 and 778.114 of the Interpretative Bulletin of the Code of Federal Regulations for Title 29, Part 778 are applied to Mr. Gamez's situation, he is, indeed, entitled to overtime compensation. The payroll ledger supports the calculations of Rollin Shell contained in Px 18. Defendant has improperly withheld overtime pay under Section 7(a) in the amount of \$2,592.00 due Mr. Gamez.

6. Alfred Lampkin—Mr. Lampkin's situation is identical to that of Howard Floyd. Mr. Lampkin is due overtime pay in the amount of \$1,946, which has been improperly withheld under Section 7(a) of the Act.

7. Curtis Lloyd—Mr. Lloyd's payroll ledger records indicate that he was paid the same hourly rate for all hours worked. For example, the ledger reflects that for the week ending August 10, 1979, he worked 66½ hours, his regular rate of pay was \$11 per hour, and he was paid a total of \$731.50. He is entitled to time and a half for all hours over 40 hours in any week. The total pay improperly denied him is \$2,121.01.

8. A. L. McElroy—Mr. McElroy did not testify. He was paid a weekly salary of \$250. The Secretary assumes he worked a 45 hour week. The Court cannot find any substantial evidence in the record which will warrant such a conclusion. There is no evidentiary basis which will support a "just and reasonable inference" that Mr. McElroy was improperly denied overtime payments mandated by Section 7(a).

9. Dennis Meyers—The payroll ledger indicates that Mr. Meyers was paid a straight hourly wage for all hours over 40 per week. The Court concludes the calculations in Px 18 are correct and he was improperly denied \$495.26 in overtime pay under Section 7(a).

10. C. H. Osborn—The payroll ledger indicates that Mr. Osborn was paid \$3.77 per hour for all the hours

he worked each week. His ledger entries contain the entry "contract labor". The significance of the entry is not explained by evidence. In any event, the calculations contained in Px 18 are correct. Mr. Osborn was improperly denied \$1,145.98 in overtime pay under Section 7(a).

11. Ivan Pense—Mr. Pense's situation is almost identical to that of John Brandon. He was equivocal in his testimony about the number of hours worked each week. The hours reflected in defendants' payroll ledger is the most persuasive evidence on this issue. Overtime pay in the total sum of \$2,654.92 was improperly withheld from Mr. Pense.

12. Sherill Rich—The payroll ledger indicates that Mr. Rich was paid \$8 an hour for all hours worked. For example, the week ending August 23, 1979, he worked 60½ hours and was paid \$484.00. Pursuant to the provisions of Section 7(a), he is entitled to \$182.00 in overtime pay which was improperly withheld.

13. Roy Van Kleer—The Court cannot locate any records in the exhibits which provide the underlying data for the claim asserted in behalf of Mr. Van Kleer. No testimony was produced at trial which would provide a basis for a "just and reasonable inference" that he is entitled to additional pay for uncompensated overtime work.

14. A. Z. Hudson—Mr. Hudson was supervisor of Alamo's construction company with power to hire and fire employees. He was paid a weekly salary of \$650. Because there was a reduction of his salary when he failed to work a full week, as is frequently the case in construction work, the Secretary takes the position that Mr. Hudson should be considered an hourly employee who was compensated at the rate of \$10 per hour and is, thereby, entitled to overtime payments totaling \$7,070.49. Mr. Shell, the Secretary's auditor, testified that, "You have to study each one (case)" to determine whether an employee should be exempt for purposes of overtime pay when he is compensated on

a salary basis. Mr. Hudson clearly agreed to payment on a salary basis, he was satisfied with the basis of pay he received, and he is asserting no claim for additional benefits. The Court does not believe it would be appropriate to treat him other than as the supervisory salaried employee he was for overtime purposes.

15. John Shasteen—The Court stated its conclusions from the bench regarding the claim in behalf of Mr. Shasteen. He was a salaried employee and there is no basis in the evidence for concluding that he is entitled to overtime pay.

16. Bill Richards—Mr. Richards was paid a weekly salary according to the payroll ledger. There is no persuasive evidence as to the number of hours he worked each week. There is no basis in the evidence for a "just and reasonable inference" that he was improperly denied overtime pay.

17. Doris Bradley—The Court can find no basis in the exhibits for concluding that Ms. Bradley was improperly denied overtime pay.

18. Don Hanks—The payroll ledger indicates Mr. Hanks was paid a weekly salary. There is no evidence in the exhibits or testimony that he worked in excess of 40 hours per week. Furthermore, there is no evidence which would support a "just and reasonable inference" that he was improperly denied overtime pay.

Conclusions of Law

I.

The Court has jurisdiction of this case as an action brought in equity pursuant to 29 U.S.C. §217.

II.

Defendants' contention that the action should be dismissed since no alleged employees are parties, nor are

any named in the complaint as required by 29 U.S.C. §216, is misplaced. An action pursuant to 29 U.S.C. §217 is separate and independent from an action under §216. *Hodgson v. Katz & Besthoff, No. 38 Inc.*, 365 F.Supp. 1193 (W.D. La. 1973). Furthermore, defendant's contention that the action is barred by the statute of limitations because the names of employees for whom benefits were sought were not identified until the time of trial is without merit. An action is commenced for purposes of relief under §217 when the complaint is filed. *Wirtz v. Novinger's Inc.*, 261 F.Supp. 698 (M.D. Pa. 1966).

III.

The businesses identified in Paragraphs III through VI of the Findings of Fact which are owned and operated by the Foundation are part of an "enterprise" within the meaning and definition of Section 3(v) of 29 U.S.C. §203(v) in that the Foundation has operated the businesses under common control for common business purposes. Even though the Foundation is incorporated as a nonprofit religious organization, the identified businesses are engaged in ordinary commercial activities in competition with other commercial businesses. See *Marshall v. Woods Hole Oceanographic Institute*, 458 F.Supp. 708 (D. Mass. 1978); cf. *Mitchell v. Pilgrim Holiness Church*, 210 F.2d 879 (7th Cir.) cert. den., 347 U.S. 1013 (1954).

IV.

The contentions of defendants that application of the Act to its commercial businesses violates constitutional principle have no merit.

A. *Overbreadth* — Extension of the Act to include the commercial activities of a nonprofit religious

organization is not unconstitutionally overbroad since coverage is rationally related to the statutorily recognized purpose of protecting competitors against unfair competition. 29 U.S.C. 202(a); cf. *Braunfeld v. Brown*, 336 U.S. 599 (1961).

B. “Wilfully unequal and oppressive” application—There is no persuasive evidence that the Secretary has engaged in a “patent abuse” of discretion in pursuing the claims against defendants. See *Moog Industries v. FTC*, 355 U.S. 411, 414 (1958). Furthermore, there is no proof that the Secretary has intentionally discriminated against defendants, nor is there any demonstration that plaintiff has intentionally discriminated as between religious groups or other nonprofit “enterprises”. *Johnson v. Robinson*, 415 U.S. 361 (1974).

C. *Infringement upon free exercise of religion* — Application of the Act to religious organizations is not a violation of the free exercise clause of the First Amendment. *Mitchell v. Pilgrim Holiness Church*, 210 F.2d 879 (7th Cir.) cert. den. 347 U.S. 1013 (1954). The provisions of the Act are neutral and application of the Act does not interfere with the free exercise of any religious beliefs. A law does not deny the free exercise of religion because it makes practice of the religion more expensive. *Braunfeld v. Brown*, 336 U.S. 599, 605 (1961).

D. *Violation of the Establishment Clause* — Application of the Act to defendants does not violate the Establishment Clause. The Act has a secular legislative purpose; application neither advances nor inhibits religion; nor does application of the Act necessitate excessive entanglement between church and state. *Leman v. Kurtzman*, 403 U.S. 602 (1971).

V.

The people who worked in the Foundation’s commercial businesses, identified in paragraphs III, IV, V and

VI, are “employees” of the defendants, Tony Alamo, Susan Alamo and the Foundation, within the meaning of the Act. By the same token, Tony Alamo, Susan Alamo and the Foundation are “employers” of those persons within the meaning of the Act.

As pointed out in *Goldberg v. Whitaker House Coop.*, 366 U.S. 28 (1960) at page 31:

“By § 3(d) of the Act an ‘employer’ is any person acting ‘in the interest of an employer in relation to an employee.’ By § 3(e) an ‘employee’ is one ‘employed’ by an employer. By § 3(g) the term employ ‘includes to suffer or permit to work.’ ”

Although many of the associates protest the payment of wages and contend they never contemplated compensation in their relationship with the Foundation’s businesses, the “economic reality” is the test of employment. *Goldberg v. Whitaker House Coop.*, *supra*; *United States v. Silk*, 331 U.S. 704 (1947); and *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947). The associates contemplated they would be fed, clothed, sheltered and provided other forms of benefits as a result of their work at the Foundation’s commercial businesses. Such benefits are simply wages in another form.

Under the circumstances, the Court concludes that *Mitchell v. Pilgrim Holiness Church Corp.*, 210 F.2d 879 (7th Cir. 1954) cert. den., 347 U.S. 1013 (1954) is controlling. In that decision, the Court noted:

“Here we have a remedial measure seeking to insure to the workers of the United States engaged in the production of goods for commerce a minimum wage sufficient to maintain a minimum standard of living which Congress deemed to be necessary to their well-being. We can find no reason for holding that the

employees of a church corporation, who work in a printing establishment owned and operated by the corporation, should not be entitled to the benefits of this remedial legislation. While some of the defendant's employees made affidavits stating that they considered their work to be "more than a job," and that in their positions they felt that there were helping in the work of the Lord, we must assume that the wages they received constituted the income on which they lived. It is not suggested that these employees could maintain a minimum standard of living any more cheaply than the employees of any other printing establishment in the City of Indianapolis. Nor is there any intimation that the minimum standard of living as fixed by the Act is not just as necessary to the health and well-being of the defendant's employees as it is to the health and well-being of the employees of any other printing establishment." 210 F.2d at 884.

Plaintiff is entitled to an injunction restraining the defendant employers from continuing to withhold payment or minimum wages and overtime compensation due workers found by this Court to come under the Act.

VI.

Defendants contend that a number of the associates who worked for the Foundation's benefit do not come under the Act because they worked for outside employers and donated their paycheck to the Foundation, worked in a "non-commercial" part of the Foundation's activities or worked in an "exempt" activity as identified in 29 U.S.C. § 213(a). It is not necessary to draw any legal conclusions with respect to those contentions at this point in view of the nature of the remedy. If a claim is filed which incorporates work activities not within those cov-

ered by the Act, the objection can be raised in opposition to that particular claim.

Remedy

The appropriate remedy, in light of the conclusions reached, is no less difficult than many other issues in this case. As previously discussed, neither the relief recommended by plaintiff, nor defendants is, in the opinion of the Court, a satisfactory solution. Since the action is an equitable claim, the Court has some latitude in fashioning an appropriate remedy.

I.

The Foundation and Tony Alamo are hereby restrained and enjoined from withholding the payment of overtime compensation found by the Court to be due the employees identified as "outside employees" in the amounts indicated in this memorandum.

II.

The Foundation and Tony Alamo shall furnish to the Secretary, within 10 days of this decision, the names and last known addresses of all persons who have been associates of the Foundation, or who have worked at any of the businesses identified in Paragraphs III, IV, V and VI from January 1, 1976, to the present. Promptly thereafter, the Secretary shall mail to each such associate, former associate, or worker, notice of this decision. The notice shall advise any associate who desires to submit a claim for back wages to submit a claim in the form of an affidavit within 45 days of the mailing of the notice by the Secretary. The form of notice and claim form shall

be prepared by the Secretary and approved by the Court. Within 20 days after the deadline for submitting claims, the Secretary shall submit a proposed finding of back wages due each claimant, based upon the affidavits, less applicable benefits found due, in accordance with the schedule of benefits findings in this memorandum. The defendants shall have 20 days thereafter in which to respond to the claims submitted.

III.

Defendants Tony Alamo and the Foundation are hereby enjoined and restrained from failing to comply with the provisions of 29 U.S.C.S. § 211 and the Regulations or orders prescribed by the Secretary thereunder.

Dated December 10, 1982.

/s/ William R. Overton
United States District Judge

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

NO. CIV 77-2183

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR

Plaintiff,

vs.

TONY AND SUSAN ALAMO FOUNDATION, ET AL.,
Defendants.

JUDGMENT

Pursuant to the Court's memorandum and orders of December 13, 1982, and this date, judgment is hereby entered in favor of the plaintiff.

Dated this February 7, 1983.

/s/ William R. Overton
United States District Judge

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

NO. CIV 77-2183

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR

Plaintiff,

vs.

TONY AND SUSAN ALAMO FOUNDATION, ET AL.,

Defendants.

ORDER

Pursuant to Rules 52(b) and 58 of the Federal Rules of Civil Procedure, plaintiff's motion for clarification and amendment of the Court's December 13, 1982, order, and for entry of judgment¹ is granted. The remedy section of Pages 39 and 40 of that order is modified to read as follows:

1. The defendants filed a notice of appeal on December 23, 1982, and plaintiff has filed his Eighth Circuit appearance with the Court of Appeals. Defendants contend that plaintiff's failure to object to the appeal and entry of appearance before the Eighth Circuit constitutes a waiver of entry of judgment. *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978). In 1979, Congress amended the Federal Rules of Appellate Procedure to deal with premature appeals. Rule 4(a)(2) of the Federal Rules of Appellate Procedure. Rule 4(a)(2) states that a notice of appeal which is filed after announcement of decision or order but before entry of judgment or order shall be treated as filed after such entry or on the day thereof. Upon entry of a separate judgment, the defendant may file a new notice of appeal, or the Court of Appeals may maintain jurisdiction over defendants' December 23, notice of appeal in order to hear the appeal after judgment is entered. *Reukema's Petroleum Co. v. Admiral Petroleum Co.*, 613 F.2d 627 (6th Cir. 1979).

Remedy

The appropriate remedy, in light of the conclusions reached, is no less difficult than many other issues in this case. As previously discussed, neither the relief recommended by the plaintiff or defendants is, in the opinion of the Court, a satisfactory solution. Since the action is an equitable claim, the Court has some latitude in fashioning the appropriate remedy.

I.

Defendants Tony Alamo and the Tony and Susan Alamo Foundation, their officers, agents, servants, employees, and all persons in active concert or participation with them are hereby permanently enjoined and restrained from failing to comply with Sections 6, 7 and 15 of the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 206, 207 and 215.

II.

Defendants Tony Alamo and the Tony and Susan Alamo Foundation are hereby restrained and enjoined from withholding the payment of overtime compensation found by the Court to be due the employees identified as "outside employees" in the amounts indicated in this memorandum, together with prejudgment interest thereon from the dates of withholding. The rate of judgment shall be calculated in accordance with 26 U.S.C. § 6621.

III.

Defendants Tony and Susan Alamo Foundation are hereby restrained and enjoined from withholding minimum wage and overtime compensation of all persons who

have been associates of the Foundation or who have worked at any of the businesses identified in Paragraphs III, IV, V and VI, from January 1, 1976, through the present who make claims for back wages pursuant to the following procedure.

The Foundation and Tony Alamo shall furnish to the Secretary, within 10 days of this decision, the names and addresses of all persons who have been associates of the Foundation, or who have worked in any of the businesses of the Foundation identified in Paragraphs III, IV, V and VI from January 1, 1976, to the present. Promptly thereafter, the Secretary shall mail to each associate, former associate, or worker, notice of the decision. The notice shall advise any associate who desires to submit a claim for back wages to submit a claim in the form of an affidavit within 45 days of the mailing of the notice by the Secretary. The form of notice and claim form shall be prepared by the Secretary and approved by the Court. Within 20 days after the deadline for submitting claims, the Secretary shall submit a proposed finding of back wages due each claimant, based upon the affidavits, less applicable benefits found due, in accordance with the schedule of benefits findings in this memorandum. The defendants shall have 20 days thereafter in which to respond to the claims submitted.

IV.

Defendants Tony Alamo and the Foundation are hereby enjoined and restrained from failing to comply with § 11(c) of the Fair Labor Standards Act, 29 U.S.C. § 211(c), and the regulations and orders prescribed by the Secretary thereunder.

It is so ordered this February 7, 1983.

/s/ William R. Overton
United States District Judge

App. 46

UNITED STATES COURT OF APPEALS
For the Eighth Circuit
September Term, 1983

Nos. 82-2549/83-1463-WA

RAYMOND J. DONOVAN, ETC.,
Appellee/Cross-Appellant,

vs.

TONY AND SUSAN ALAMO FOUNDATION, ET AL.,
Appellants/Cross-Appellees.

APPEALS FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF ARKANSAS.

It is now here ordered by the Court that motion to
stay issuance of mandate pending certiorari proceedings
(Appellants/Cross-Appellees') is denied.

March 12, 1984

App. 47

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

JUDGMENT
September Term, 1983

No. 82-2549WA and 83-1463WA

RAYMOND J. DONOVAN, SECY. OF LABOR

Appellee,

vs.

TONY & SUSAN ALAMO FOUNDATION

Appellants.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF ARKANSAS.

This appeal from the United States District Court
for the Western District of Arkansas was submitted on
the record of the said District Court, briefs of the parties
and was argued by counsel.

After consideration, it is ordered and adjudged that
the judgment of the said District Court in this cause is
affirmed in part and vacated in part and remanded to
District Court for proceedings consistent with the opinion
of this court.

December 5, 1983

A True Copy:

ATTEST:

Clerk, U. S. Court of Appeals, Eighth Circuit, 3/12/84

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

Nos. 83-1463, 82-2549

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
U. S. DEPARTMENT OF LABOR

Plaintiff/Appellee/Cross Appellant,

vs.

TONY AND SUSAN ALAMO FOUNDATION,
TONY ALAMO, SUSAN ALAMO AND
LARRY LAROCHE

Defendants/Appellants/Cross-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF ARKANSAS,
FORT SMITH DIVISION.

Submitted: September 17, 1983
Filed: December 5, 1983

Before LAY, Chief Judge, McMILLIAN, Circuit Judge
and DUMBAULD*, Senior District Judge.

DUMBAULD, Senior District Judge.

The questions in this case are whether the Fair Labor Standards Act and its minimum wage, overtime, and record-keeping provisions (29 U.S.C. 201 *et seq.*), properly construed, apply to certain persons engaged in working for a religious organization, and whether, if so, such application conflicts with the religious guarantees of the

*The Honorable Edward Dumbauld, Senior U.S. District Judge of the Western District of Pennsylvania, sitting by designation.

First Amendment. We answer the first question affirmatively, the second in the negative.

The Secretary of Labor, under 29 U.S.C. 217, brought an action against appellants the Tony and Susan Alamo Foundation, a California corporation, and three of its officers individually¹, alleging violations of the minimum wage, overtime, and record-keeping provisions of the Act [29 U.S.C. 206(b), 207(a), 211(c), 215(a)(2), and 215(a)(5)] over a period of years.²

The foundation engages actively in evangelism and is recognized by the IRS as a religious and charitable organization under 28 U.S.C. 501(c)(3).

Certain persons are admittedly employees of the foundation, and any controversy regarding such "outside employees" relates merely to factual questions as to whether and how much overtime they worked. As to these matters the findings of the District Court are not "clearly erroneous." Rule 52(a) FRCP.

The genuine and substantial controversy in the case relates to the status of some 300 persons designated as "associates" of the foundation. The organization's evangelical work has been carried on among derelicts, drug

¹Susan Alamo, named as an individual defendant, died *pendente lite*.

²§206(b) requires payment by an employer to employees of wages at the minimum rate fixed by §206(a)(1). §207(a) provides for overtime pay of time and a half; §211(c) provides for record-keeping; §215(a)(2) makes violations of §206 and §207 illegal; §215(a)(5) makes violations of §211(c) illegal; and §217 empowers District Courts to restrain violations of §215, including "restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees" in violation of §215(a)(2).

addicts, and criminals. As part of their rehabilitation they perform useful work in the thirty some commercial businesses operated by the foundation. They also receive lodging, food, transportation, and medical care provided by the foundation. They claim to be volunteer workers and to expect no compensation. They do expect to receive (and indeed otherwise many of them could not live without resort to public assistance or crime) the aforementioned benefits of lodging, food, transportation, and medical care.

The questions in this case are difficult and delicate. Perhaps the key to their determination is the familiar maxim of Justice Holmes that all questions are ultimately questions of degree and must be decided on their particular facts.³

It is clear, on the one hand, that an individual such as a prosperous lawyer ringing the bell for the Salvation Army on the street at Christmas time for a few hours is not an "employee," but a volunteer donating his time to the advancement of a worthy cause. The same is true of persons caring for children on Sunday during church services, or preparing and serving meals at a church dinner.

It must also be acknowledged that *laborare est orare*, that

"Who sweeps a room, as for Thy laws
Makes that and th' action fine"⁴

³For citation of cases where Holmes elaborates this aphorism, see *Pgh. & New England Trucking Co. v. U.S.*, 345 F. Supp. 743, 747 n. 4 (1972).

⁴George Herbert, *The Elixir*, stanza 5.

and that St. Paul was a tentmaker,⁵ and that champagne and chartreuse owe their origin to the extra-religious activities of monastic orders.

Yet it is equally clear that there comes a time when secular endeavor must be recognized as such, and passes over the line separating it from the sacred functions of religious worship.

Perhaps the distinction somewhat resembles that between the essentially governmental activities of a State as a State, and its activities of a commercial or proprietary nature. When a State sells liquor or bottled water, or runs a railroad, it casts aside its sovereign attributes and competes on the same footing as other entrepreneurs in the market place. *South Carolina v. U. S.*, 199 U. S. 437, 461, 463 (1905); *New York v. U. S.*, 326 U. S. 572, 575, 579, 582 (1946); *National League of Cities v. Usery*, 426 U. S. 833, 845 (1976); *EEOC v. Wyoming*, 103 Sup. Ct. 1054, 1060-82 (1983).

The same metamorphosis or transmogification occurs when a religious organization turns from the things of God to the things of Caesar.⁶

Upon careful reflection we are impelled to conclude that the foundation's activities in the case at bar have overstepped the dividing line and become subject to the requirements of the Fair Labor Standards Act.

The extensive scope and substantial character of the foundation's commercial operations are elaborated in

⁵Acts 19:3, 20:34.

⁶"And he said unto them, 'Render therefore unto Caesar the things which be Caesar's, and unto God the things which be God's.'" Lk. 20:25.

Judge Overton's opinion. In California the foundation furnishes contract labor crews, engages in the manufacture and retail sale of clothing, and runs a service station supplying gasoline to motorists.

In Arkansas the foundation's commercial dealings include, *inter alia*, advertising, landscaping, service stations, restaurants, production and sale of candy, manufacture and retail sale of clothing, groceries, vehicle repairs, record-keeping, construction, plumbing, sand and gravel, construction, electrical contracting, ready-mixed concrete, hog farms, feed and farm supplies, real estate development, motor carrier transportation of freight, and other commercial ventures.⁷

It must be emphasized that these businesses serve the general public, in competition with other private entrepreneurs. The gas stations, for example, serve any motorist, and are not limited to fueling vehicles used for transportation of foundation associates on their travel in connection with their evangelical efforts. The grocery stores, clothing stores, and restaurants serve the public at large, not merely associates of the foundation. The foundation's motor trucks are not confined to private carriage of supplies for the foundation's own needs, but are common carriers holding out service to the public generally.

⁷The fact that these various businesses, though conducted under different trade names, are controlled entirely by the foundation, makes all these activities an "enterprise" under 29 U.S.C. 203(r) and 206(a).

Under the "economic reality" test⁸ it would be difficult to conclude that the extensive commercial enterprise operated and controlled by the foundation was nothing but a religious liturgy engaged in bringing good news to a pagan world. By entering the economic arena and trafficking in the marketplace, the foundation has subjected itself to the standards Congress has prescribed for the benefit of employees. The requirements of the Fair Labor Standards Act apply to its laborers.

It remains to consider whether application of the Fair Labor Standards Act to "associates" of the foundation in the case at bar violates the religious guarantees of the First Amendment.

The First Amendment's provisions touching religious liberty are twofold. Not only is the individual free from all governmental coercion to participate against his will in the support of any religion (either directly, as by compulsion to attend ceremonies, or indirectly, as by compulsion through taxation to make contributions), but also is free from all governmental coercion interfering with his participation in the support (directly or indirectly) of any religion which he does choose of his own will to embrace.⁹

As stated by Justice Owen J. Roberts in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940):

⁸For purposes of the National Labor Relations Act, said Justice Reed in *U.S. v. Silk*, 331 U.S. 704, 713 (1947), "'employees' included workers who were such as a matter of economic reality." The same day he applied the same test with respect to the Fair Labor Standards Act. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727 (1947).

⁹Dumbauld, *The Bill of Rights and What It Means Today* (1957), 2nd ed. 1963), 110-111.

The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. . . . On the other hand, it safeguards the free exercise of the chosen form of religion.

It has become customary to describe these two facets of constitutional protection as the Establishment Clause and the Free Exercise Clause, respectively.¹⁰

Both types of guarantee were contained in the celebrated Virginia Act for Establishing Religious Freedom¹¹ drafted by Thomas Jefferson¹² and pushed through the Virginia legislature by James Madison in 1786 before he left the legislative arena at Richmond to gain new laurels on the national scene at the Philadelphia convention of 1787 as Father of the Federal Constitution.¹³ The major role played by Madison in securing enactment of the Bill of Rights, and in particular the religious clauses of the First Amendment, has been repeatedly recognized.¹⁴

¹⁰The Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ." See *Abington School District v. Schempp*, 374 U.S. 203, 215 (1963).

¹¹12 Hening, *The Statutes at Large . . . of Virginia* (1823) 84-86.

¹²For Jefferson's draft, which was in some particulars amended in the legislature, see 2 P.L. Ford (ed.), *The Works of Thomas Jefferson* (1904) 438-41, and 2 Julian Boyd (ed.), *The Papers of Thomas Jefferson* (1959) 545-53.

¹³Dumbauld, *Thomas Jefferson and the Law* (1978) 137, 139. Jefferson was in France from 1784-1789 serving the United States as a diplomat.

¹⁴A detailed account is given in Justice Rutledge's dissenting opinion in *Everson*, 330 U.S. at 33-41. See also Dumbauld, *The Bill of Rights and What It Means Today* (1957, 2nd ed. 1963) 7-8, 21, 23-24, 33-44, 48; Dumbauld, "State Precedents for the Bill of Rights," 7 J. Pub. Law (1958) 323.

The operative portion of the Virginia statute provided:

"That no man shall be compelled to frequent or support any religious worship, place, or ministry, whatsoever, nor shall be enforced, restrained, molested or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities. . . ."¹⁵

In Establishment Clause cases a three-part test has been elaborated by the Supreme Court. Government action passes muster under this clause if: (1) the statute has a secular legislative purpose; (2) its principal or primary effect must neither advance nor inhibit religion; (3) it must not foster excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

¹⁵It will be noted that the Virginia act, besides establishment and free exercise clauses, provides a third guarantee, that civil rights shall not be affected by reason of religious views. In the federal Constitution, this point is covered by Article VI, clause 3, providing that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." In England dissenters from the established church were subject to the civil disability of exclusion from public office, as well as from the practice of law, medicine, or any other liberal profession. J. R. Tanner, *Constitutional Documents of the Reign of James I* (1930) 109. They were also obliged to attend, and to pay taxes to support, the services of the established church. Tanner, *Tudor Constitutional Documents* (2nd ed. 1930) 153, 197. They were also forbidden to engage in any other form of religious worship. *Ibid.*, 119-20. Likewise in Virginia, under the harsh code of laws issued by Sir Thomas Dale in 1611, failure to attend church services was punishable by death. Dumbauld, *Thomas Jefferson and the Law* (1978) 126, 232.

Measured by this standard, the Fair Labor Standards Act in the case at bar does not run afoul of the Establishment Clause. The secular legislative purpose of this legislation is clear. It was set forth by Justice Reed, in *Rutherford Food*, cited in note 8 *supra*. It is straightforward secular social legislation of an economic character aimed at eliminating conditions detrimental to the health and economic welfare of workers.¹⁶ These circumstances make clear likewise that there is no infringement of the second point of the test, regarding the effect of the legislation. It has nothing to do with religion, and neither advances nor inhibits religious concerns.

Likewise no "excessive entanglement between government and religion"¹⁷ can be discerned in the case at bar, although this issue is probably appellees' strongest point, and *NLRB v. Roman Catholic Bishop of Chicago*, 440 U.S. 490, 501-504 (1979), the best case that could be cited in appellees' behalf, although it arose under a different statute.¹⁸

It should be noted that the doctrine of "excessive entanglement" arose in connection with church schools, rather than in connection with church-operated charities

¹⁶Though *Everson v. Bd. of Education*, 330 U.S. 1, 15-16 (1947), the pioneer leading case on the Establishment Clause in an educational setting, had been decided only four months earlier (a 5-4 decision with strong dissents by Justices Jackson and Rutledge) the idea of any infringement of that clause by the economic impact of the Fair Labor Standards Act did not cross the mind of any member of the unanimous *Rutherford* court.

¹⁷403 U.S. at 614.

¹⁸In *Rutherford*, *supra*, 331 U.S. at 723, it was said that the Fair Labor Standards Act is "social legislation . . . of the same general character as the National Labor Relations Act" and the Social Security Act.

or commercial businesses, such as are involved in the case at bar.

In the *Bishop of Chicago* case the Court "recognized the critical and unique role of the teacher" in fulfilling the mission of a church-operated school (whose very *raison d'être* is the propagation of a religious faith), and that the church-teacher relationship in a church-operated school "differs from the employment relationship in a public or other non-religious school." 440 U.S. at 501-504. Teachers being living persons, they cannot, like books, be inspected once to determine whether their teaching conforms to the constitutional standards respecting separation of church and state. Rather, there must be ongoing comprehensive and continuous state surveillance and monitoring to ensure that First Amendment restrictions are obeyed. This process necessarily involves "excessive and enduring entanglement between state and church." *Lemon v. Kurtzman*, *supra*, 403 U.S. at 619. The same type of continuing audit would be needed to ensure the proper application of funds, and to ensure that buildings constructed with public moneys were never used for religious instruction. *Ibid.*, 608, 620-22.¹⁹

The *Bishop of Chicago* case, which shows to what length the Supreme Court will go in restricting coverage of a statute in order to avoid raising substantial constitutional questions with regard to "entanglement", was itself a church school case and implicated the unique role of the teacher and the danger of government involvement in day-to-day administration and monitoring.

¹⁹But see *Tilton v. Richardson*, 403 U.S. 672, 687-88 (1971); *Hunt v. McNair*, 413 U.S. 734, 745-49 (1973), where the need for inspection was found to be insignificant.

Application of the Fair Labor Standards Act in the case at bar, however, would be more akin to the inspection of textbooks which *Lemon v. Kurtzman* distinguished from the continuous monitoring required where the unintentional and spontaneous conduct of teachers constituted the human factor creating the danger of infringing the "wall of separation" between church and state. 403 U.S. at 619. The role of public officials in enforcing wage and hour requirements would be more analogous to the task of accountants or auditors examining the books of a business enterprise. Their function is to scrutinize written records relating to past transactions rather than to evaluate the "live" activities of teachers within the framework of administrative policy.

Another significant distinction which weakens the force of the *Bishop of Chicago* case as a possible precedent for the case at bar is derivable from the differing nature of the statutory schemes involved. Though the general policy and purpose of both statutes as social legislation for protecting the health and economic welfare of workers is similar,²⁰ the mechanisms utilized are quite different.

The Fair Labor Standards Act, as stated above, effects its objectives by the dull and detailed financial technique peculiar to accountants. The National Labor Relations Act on the other hand, utilizes, *inter alia*, the methods of collective bargaining and elections to choose employee representatives.

Collective bargaining, like all bargaining, is confrontational and adversarial in its nature. Each side is moti-

²⁰See note 18, *supra*.

vated by self-interest and seeks to increase its own benefits at the expense of the opposing party. Conflict is inherent in the situation. Similar partisan contests infect the process of electing employee representatives, as competing labor unions strive for mastery. These aspects of the operation of the Labor Relations statute dominated the Court's thinking in the *Bishop of Chicago* case (440 U.S. at 503), but have no bearing on the application of the wage and hour requirements in the case at bar, or on the calculation of the amounts due the underpaid workers.

There is surely no constitutional right, under the religion clauses of the First Amendment, to pay substandard wages.²¹

The essence of the Establishment Clause is its prohibition of coercion by governmental power applied for the benefit of religion. Such coercion may consist in compulsion to participate in religious activities or ceremonies, or in compulsion to pay taxes for the support of religious activities or programs. As succinctly summarized in the landmark Virginia legislation sponsored by Jefferson and Madison which was quoted hereinabove, the prohibition forbids governmental compulsion either "to frequent or support" any religious activity.

Obviously, appellants in the case at bar are not being compelled by the government to "frequent" any religious observance. They are not being dragooned into attending any church services or ceremonies against their

²¹The right of a State to pay substandard wages, recognized in *League of Cities v. Uery*, 426 U.S. 833, 844-45 (1976), was based on principles of federalism, not on First Amendment grounds.

will. It is equally plain that they are not being compelled to "support" any such activities. All that they are compelled to do is to pay the standard living wage for work done in their commercial enterprises. This is purely a matter of social legislation in the field of economic welfare, not religion. Appellants' contention is a far cry from Jefferson's pronouncement "That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical."²²

Appellants' contention that the Free Exercise Clause would be violated by application of the wage and hour requirements in the case at bar is even more clearly without merit. Such enforcement of wage and hour provisions cannot possibly have any direct impact on appellants' freedom to worship and evangelize as they please. The only effect at all on appellants is that they will derive less revenue from their business enterprises if they are required to pay the standard living wage to the workers. And the Supreme Court has squarely held that legisla-

²²² Ford, *Works of Thomas Jefferson* (1904) 439. On another occasion he wrote: "The restoration of the rights of conscience relieved the people from taxation for the support of a religion not theirs; for the establishment was truly of the religion of the rich, the dissenting sects being entirely composed of the less wealthy people." 1 Ford, *Works* (1904) 78. Relief of dissenters from paying tithes to maintain the established Anglican church in Virginia was one of Jefferson's early legislative triumphs in the Virginia House of Delegates, after what he regarded as one of "the severest contests in which I have ever been engaged." *Ibid.*, 62-63. The thoroughgoing act for religious freedom did not become law until a decade later. For comment on the act of December 9, 1776, 9 Hening, *Statutes* (1821) 164, see 1 Boyd *Papers of Thomas Jefferson* (1950) 525-58; and Dumas Malone, *Jefferson the Virginian* (1948) 274-80.

tion otherwise legitimate does not violate the Free Exercise Clause merely because financial detriment results. *Braunfeld v. Brown*, 366 U.S. 599, 605-606 (1961).

With respect to the Government's cross-appeal, we conclude that the District Court's proposed procedure requiring "associates" to initiate proceedings to obtain payment of amounts due them does not comport with the policy of the statute. It would place on the employee a burden properly falling upon the employer.

As the Supreme Court held in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946), it is the employer who is charged with the duty of record-keeping so that the amount of work performed and compensation earned may be calculated with precision. An employer failing to comply with this duty cannot complain if the record is deficient and the court must resort to a reasonable approximation in computing the amount of damages awarded.

The solution to the problem presented "where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes" is not to "penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying the compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was im-

properly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate." (328 U.S. at 687-88).

The reasons supporting the *Mt. Clemens Pottery* standard were clearly and forcefully set forth by the Court (328 U.S. at 688):

The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of § 11(c) of the Act. And even where the lack of accurate records grows out of a bona fide mistake as to whether certain activities or non-activities constitute work, *the employer, having received the benefits of such work, cannot object to the payment for the work on the most accurate basis possible under the circumstances.* Nor is such a result to be condemned by the rule that precludes the recovery of uncertain and speculative damages. That rule applies only to situations where the fact of damage is itself uncertain. But here we are assuming that the employee has proved that he has performed work and has not been paid in accordance with the statute. The damage is therefore certain. The uncertainty lies only in the amount of damages arising from the statutory violation by the employer. In such a case "it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts." *Story Parch-*

ment Co. v. Paterson Co., 282 U.S. 555, 563. It is enough under these circumstances if there is a basis for a reasonable inference as to the extent of the damages. *Eastman Kodak Co. v. Southern Photo Co.*, 273 U.S. 359, 377-379; *Palmer v. Connecticut R. Co.*, 311 U.S. 544, 500-561; *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 263-266. [Italics supplied].

This Court, in several cases, has consistently followed the *Mt. Clemens Pottery* standard. *Marshall v. Van Matre*, 634 F. 2d 1115, 1118-19 (1980); *Mumbower v. Callicott*, 526 F. 2d 1183, 1186 (1975); *Mitchell v. Williams*, 420 F. 2d 67, 69-70 (1969). That standard "requires courts to apply practical standards" (420 F. 2d at 69) and does not permit employers failing to keep the records required by law "to benefit from their failure to do so" (526 F. 2d at 1186). The *Mt. Clemens Pottery* standard is applicable notwithstanding the employer's "good faith" and lack of intention "to violate the act purposefully." (634 F. 2d at 1118).

Accordingly, in conformity with the controlling authorities, paragraph II under the heading "Remedies" of the District Court's order of December 10, 1982 is hereby vacated and the cause remanded for determination of the amounts of wages owing, such determination to be based either upon the present record or as supplemented by such additional evidence as the District Court may afford the parties an opportunity to offer (420 F. 2d at 71). In all other respects the judgment of the court below is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 82-1463, 83-2549

RAYMOND J. DONOVAN, Secretary of Labor,
U.S. Department of Labor,

Plaintiff/Appellee/
Cross Appellant,

v.

TONY and SUSAN ALAMO FOUNDATION,

Defendants/Appellants/
Cross-Appellees.

Appeal from the United States District Court for the
District of Arkansas, Fort Smith Division

ORDER

Before LAY, Chief Judge, McMILLIAN, Circuit Judge
and DUMBAULD*, Senior District Judge.

DUMBAULD, Senior District Judge.

IT IS ORDERED, that the opinion filed December
5, 1983, in the above case be amended as follows:

Page 2, line 8: delete "any;" and insert "chiefly" for
"merely."

*The Honorable Edward Dumbauld, Senior U. S. District
Judge of the Western District of Pennsylvania, sitting by desig-
nation.

Page 15: Delete the second paragraph and substitute
the following:

But although it is clear that the employer has the
burden of establishing the amount of damages to which
the employee is entitled, *Donovan v. Williams Chemical
Co.*, 682 F. 2d 185, 190 (8th Cir. 1982), and has a duty to
keep records pertinent to this calculation, we are unable
to accept the Secretary's contention that no other evidence
may be utilized for this purpose than the records which
the employer is required by law to keep.

The court is not obliged to accept the Secretary's
computation as conclusive simply because the employer
has failed to provide the "preappointed evidence" (as
Jeremy Bentham would express it) which he is obliged
to preserve. In *Williams Chemical*, this Court remanded
the case to the District Court with directions that "addi-
tional evidence" might be considered with respect to the
issue in controversy.²³ And in *Mt. Clemens Pottery, su-
pra*, the Supreme Court regarded it as appropriate for
the court's determination to be based upon "the most
accurate basis possible under the circumstances" and held
that it is sufficient "if there is a basis for a reasonable
inference as to the extent of the damages." (328 U.S. at
688).

Accordingly, in conformity with the controlling au-
thorities, paragraph II under the heading "Remedies" of

²³682 F. 2d at 190. See also *Donovan v. New Floridian
Hotel, Inc.*, 676 F. 2d 468, 474 (11th Cir. 1982), which speaks of
the failure of the employer to produce "records or other evi-
dence" to establish the "reasonable cost" of facilities provided
to employees. (Italics supplied).

the District Court's order of December 10, 1982 is hereby vacated and the cause remanded for determination of the amounts of wages owing, such determination to be based either upon the present record or as supplemented by such additional evidence as the District Court may afford the parties an opportunity to offer (420 F. 2d at 71).

At the same time upon remand the parties may wish to develop the record further with respect to the status of A. Z. Hudson, one of the Foundation's "outside employees" who was treated by the District Court as a "supervisory salaried employee" exempt under 29 U.S.C. 213(a) (1). The Secretary's contention that this defense was excluded from the case as a sanction against the Foundation for failing to comply with discovery orders seems excessively technical and would exalt form over substance, in view of the fact that at a later stage of the case the trial court permitted evidence to be admitted regarding this issue.

The District Court clearly found that Hudson was supervisor of Alamo's construction company with power to hire and fire employees (as required by 29 CFR 541.106) and that he received a weekly salary of \$650 (29 CFR 541.1(f) requires only \$155 per week). The court did not expressly find that he regularly supervised at least two full-time employees (as required by 29 CFR 541.105) but it is highly improbable that a construction company could operate with less than two employees. The Secretary's principal argument is that Hudson's salary was not paid continuously regardless of fluctuations in the volume of business, as required by 29 CFR 541.118.

If the facts regarding Hudson's employment were not fully and sufficiently developed so as to establish clearly

whether he met the criteria for exemption *vel non*, the matter can be clarified upon remand.

In all other respects the judgment of the court below
is **AFFIRMED.**

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1983

82-2549-WA AND 83-1463-WA.

RAYMOND J. DONOVAN, ETC.,

Appellee/Cross Appellant,

VS.

TONY AND SUSAN ALAMO FOUNDATION;
TONY ALAMO, SUSAN ALAMO AND
LARRY LAROCHE,

Appellants/Cross Appellees.

APPEALS FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF ARKANSAS

Petitions of appellants/cross appellees and Appellee/
cross appellant for rehearing filed in this cause having
been considered, it is now here ordered by this Court that
the same be, and they are hereby, denied.

March 1, 1984

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APPENDIX C

28 U.S.C.A. § 1291:

Final Decisions of District Courts. The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in section 1292(c) and (d) and 1925 of this title.

29 U.S.C.A. § 201:

This chapter may be cited as the "Fair Labor Standards Act of 1983".

29 U.S.C.A. § 203(e) (1):

Except as provided in paragraphs (2) and (3), the term "employee" means any individual employed by an employer.

29 U.S.C.A. § 203(g):

"Employee" includes to suffer or permit to work.

29 U.S.C.A. § 203(m):

"Wage" paid to any employee includes the reasonable costs, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees: *Provided*, That the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded there-

from under the terms of a bona fide collective bargaining agreement applicable to the particular employee: *Provided further*, That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee.

29 U.S.C.A. § 203(r):

"Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor.

29 U.S.C.A. § 203(s)(1), (3), (4), (5), and (6):

"Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and which (1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than

\$500,000 (exclusive of excise taxes at the retail level which are separately stated) or is a gasoline serve establishment whose annual gross volume of sales is not less than \$250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969, is an enterprise, other than an enterprise which is comprised exclusively of retail or service establishments and which is described in paragraph (2) whose annual gross volume of sales made or business done is not less than \$250,000 (exclusive of excise taxes at the retail level which are separately stated); . . . (3) is engaged in laundering, cleaning, or repairing clothing or fabrics; (4) is engaged in the business of construction or reconstruction, or both; (5) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or (6) is an activity of a public agency.

29 U.S.C.A. §206(a)(1):

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates: (1) not less than \$2.65 an hour during the year beginning January 1, 1978, not less than \$2.90 an hour during the year beginning January 1, 1979, not less than \$3.10 an hour during the year beginning January 1, 1980, and not less than \$3.35

an hour after December 31, 1980, except as otherwise provided in this section.

29 U.S.C.A. § 206(b):

Every employer shall pay to each of his employees (other than an employee to whom subsection (a)(5) of this section applies) who in any workweek is engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966, title IX of the Education Amendments of 1972, or the Fair Labor Standards Amendments of 1974, wages at the following rate: Effective after December 31, 1977, not less than the minimum wage rate in effect under subsection (a)(1) of this section.

29 U.S.C.A. § 207(a) (1):

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions. (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C.A. § 211:

(a) The Administrator or his designated representatives may investigate and gather data regarding the wages,

hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter. Except as provided in section 212 of this title and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 212 of this title, the Secretary of Labor shall bring all actions under section 217 of this title to restrain violations of this chapter. (b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Secretary of Labor may, for the purpose of carrying out their respective functions and duties under this chapter, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes. (c) Every employee subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regu-

lations or orders thereunder. (d) The Administrator is authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this chapter, and all existing regulations or orders of the Administrator relating to industrial homework are continued in full force and effect.

29 U.S.C.A. § 215(a)(2), (3), (4), and (5):

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person . . . (2) to violate any of the provisions of section 206 or section 207 of this title, or any provisions of any regulation or order of the Administrator issued under section 214 of this title; . . . (4) to violate any of the provisions of section 212 of this title; (5) to violate any of the provisions of section 211(c) of this title, or any regulation or order made or continued in effect under the provisions of section 211(d) of this title, or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

29 U.S.C.A. § 215(b):

(b) For the purposes of subsection (a)(1) of this section proof that an employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

29 U.S.C.A. § 217:

The district courts, . . . shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title).

Internal Revenue Code §§ 501(a) and (c) (3):

(a) Exemption From Taxation. An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503. . . . (c) (3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals), no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, (except as otherwise provided in subsection (6)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

29 CFR § 516.27:

"Board, lodging, or other facilities" under section 3(m) of the Act. (a) In addition to keeping other records required by the regulations in this part, an employer who makes deductions from the wages of his employees for "board, lodging, or other facilities" (as these terms are used in sec. 3(m) of the Act) furnished to them by the employer or by an affiliated person, or who furnishes such "board, lodging, or other facilities" to his employees as an addition to wages, shall maintain and preserve records substantiating the cost of furnishing each class of facility except as noted in paragraph (c) of this section. Separate records of the cost of each item furnished to an employee need not be kept. The requirement may be met by keeping combined records of the costs incurred in furnishing each class of facility, such as housing, fuel, or merchandise furnished through a company store or commissary. Thus, in the case of an employer who furnishes housing, separate cost records need not be kept for each house. The cost of maintenance and repairs for all the houses may be shown together. Original costs and depreciation records may be kept for groups of houses acquired at the same time. Costs incurred in furnishing similar or closely related facilities, moreover, may be shown in combined records. For example, if joint costs are incurred in furnishing both housing and electricity and the records are not readily separable, the housing and electricity together may be treated as a "class" of facility for record-keeping purposes. Merchandise furnished at a company store may be considered as a "class" of facility and the records may show the cost of the operation of the store as a whole, or records showing the cost of furnishing the different kinds of merchandise may be maintained sep-

arately. Where cost records are kept for a "class" of facility rather than for each individual article furnished to employees, the records must also show the gross income derived from each such class of facility; e.g., gross rentals in the case of houses, total sales through the store or commissary, total receipts from sales of fuel, etc. (1) Such records shall include itemized accounts showing the nature and amount of any expenditures entering into the computation of the reasonable cost, as defined in Part 531 of this chapter, and shall contain the data required to compute the amount of the depreciated investment in any assets allocable to the furnishing of the facilities, including the date of acquisition or construction, the original cost, the rate of depreciation and the total amount of accumulated depreciation on such assets. If the assets include merchandise held for sale to employees, the records should contain data from which the average net investment in inventory can be determined. (2) No particular degree of itemization is prescribed. The amount of detail shown in these accounts should be consistent with good accounting practices, and should be sufficient to enable the Administrator or his representative to verify the nature of the expenditure and the amount by reference to the basic records which must be preserved pursuant to § 516.6(c) (3). (b) If additions to or deductions from wages paid (1) so affect the total cash wages due in any workweek (even though the employee actually is paid semimonthly) as to result in the employee receiving less in cash than the applicable minimum hourly wage, or (2) if the employee works in excess of the applicable maximum hours standard and (i) any addition to the wages paid are a part of his wages, or (ii) any deductions made are claimed as allowable deductions under sec. 3(m)

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of the Act, the employer shall maintain records showing those additions to or deductions from wages paid on a workweek basis. (For legal deductions not claimed under sec. 3(m) and which need not be maintained on a workweek basis, see §§ 531.38 to 531.40 of this chapter.) (c) The records specified in this § 516.27 are not required with respect to an employee in any workweek in which he is not subject to the overtime provisions of the Act and receives not less than the applicable statutory minimum wage in cash for all hours worked in that workweek. (The application of section 3(m) of the Act on nonovertime weeks is discussed in § 531.36 of this chapter.)

29 CFR § 516.7(b):

Place for keeping records and their availability for inspection. (b) Inspection of records. All records shall be open at any time to inspection and transcription by the Administrator or his duly authorized and designated representative.

29 CFR § 516.8:

Computations and reports. Each employer required to maintain such extension, recomputation, or transcription of his records and shall submit to the Wage and Hour Division such reports concerning persons employed and the wages, hours, and other conditions and practices of employment set forth in his records as the Administrator or his duly authorized and designated representative may request in writing.

29 CFR § 531.3:

General determination of "reasonable cost". (a) The term "reasonable cost" as used in section 3(m) of the Act is

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hereby determined to be not more than the actual cost to the employer of the board, lodging, or other facilities customarily furnished by him to his employees. (b) "Reasonable cost" does not include a profit to the employer or to any affiliated person. (c) Except whenever any determination made under § 531.4 is applicable, the "reasonable cost" to the employer of furnishing the employee with board, lodging, or other facilities (including housing) is the cost of operation and maintenance including adequate depreciation plus a reasonable allowance (not more than 5½ percent) for interest on the depreciated amount of capital invested by the employer: *Provided*, That if the total so computed is more than the fair rental value (or the fair price of the commodities or facilities offered for sale), the fair rental value (or the fair price of the commodities or facilities offered for sale) shall be the reasonable cost. The cost of operation and maintenance, the rate of depreciation, and the depreciated amount of capital invested by the employer shall be those arrived at under good accounting practices. As used in this paragraph, the term "good accounting practices" does not include accounting practices which have been rejected by the Internal Revenue Service for tax purposes, and the term "depreciation" includes obsolescence. (d) (1) The cost of furnishing "facilities" found by the Administrator to be primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages. (2) The following is a list of facilities found by the Administrator to be primarily for the benefit of convenience of the employer. The list is intended to be illustrative rather than exclusive: (i) Tools of the trade and other materials and services incidental to carrying on the employer's busi-

ness; (ii) the cost of any construction by and for the employer; (iii) the cost of uniforms and of their laundering, where the nature of the business requires the employee to wear a uniform.

29 CFR § 531.29:

Board, lodging, or other facilities. Section 3(m) applies to both of the following situations: (a) Where board, lodging, or other facilities are furnished in addition to a stipulated wage; and (b) where charges for board, lodging, or other facilities are deducted from a stipulated wage. The use of the word "furnishing" and the legislative history of section 3(m) clearly indicate that this section was intended to apply to all facilities furnished by the employer as compensation to the employee, regardless of whether the employer calculates charges for such facilities as additions to or deductions from wages.

29 CFR § 531.30:

"Furnished" to employee. The reasonable cost of board, lodging, or other facilities may be considered as part of the wage paid an employee only where customarily "furnished" to the employee. Not only must the employee receive the benefits of the facility for which he is charged, but it is essential that his acceptance of the facility be voluntary and uncoerced.

29 CFR § 531.31:

"Customarily" furnished. The reasonable cost of board, lodging, or other facilities may be considered as part of the wage paid an employee only where "customarily" furnished to the employee. Where such facilities are "fur-

nished" to the employee, it will be considered a sufficient satisfaction of this requirement if the facilities are furnished regularly by the employer to his employees or if the same or similar facilities are customarily furnished by other employees engaged in the same or similar trade, business, or occupation in the same or similar communities. Facilities furnished in violation of any Federal, State, or local law, ordinance or prohibition will not be considered facilities "customarily" furnished.

29 CFR § 531.32(a):

"Other facilities." (a) "Other facilities", as used in this section, must be something like board or lodging. The following items have been deemed to be within the meaning of the term: Meals furnished at company restaurants or cafeterias or by hospitals, hotels, or restaurants to their employees; meals, dormitory rooms, and tuition furnished by a college to its student employees; housing furnished for dwelling purposes; general merchandise furnished at company stores and commissaries (including articles of food, clothing, and household effects); fuel (including coal, kerosene, firewood, and lumber slabs), electricity, water, and gas furnished for the noncommercial personal use of the employee; transportation furnished employees between their homes and work where the travel time does not constitute hours worked compensable under the Act and the transportation is not an incident of and necessary to the employment.

29 CFR § 531.33:

"Reasonable cost"; "fair value." (a) Section 3(m) directs the Administrator to determine "the reasonable cost

* * * to the employer of furnishing * * * facilities" to the employee, and in addition it authorizes him to determine "the fair value" of such facilities for defined classes of employees and in defined areas, which may be used in lieu of the actual measure of the cost of such facilities in ascertaining the "wages" paid to any employee. Subpart B contains three methods whereby an employer may ascertain whether any furnished facilities are a part of "wages" within the meaning of section 3(m): (1) An employer may calculate the "reasonable cost" of facilities in accordance with the requirements set forth in § 531.3; (2) an employer may request that a determination of "reasonable cost" be made, including a determination having particular application; and (3) an employer may request that a determination of "fair value" of the furnished facilities be made to be used in lieu of the actual measure of the cost of the furnished facilities in assessing the "wages" paid to an employee. (b) "Reasonable cost", as determined in § 531.3 "does not include a profit to the employer or to any affiliated person". Although the question of affiliation is one of fact, where any of the following persons operate company stores or commissaries or furnish lodging or other facilities which they will normally be deemed "affiliated persons" within the meaning of the regulations: (1) A spouse, child, parent, or other close relative of the employer; (2) a partner, officer, or employee in the employer company or firm; (3) a parent, subsidiary, or otherwise closely connected corporation; and (4) an agent of the employer.

29 CFR § 541.118(a):

Salary basis. (a) An employee will be considered to be paid "on a salary basis" within the meaning of the regu-

lations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

29 CFR § 779.212:

Enterprise must consist of related activities performed for a "common business purpose". The related activities described in section 3(r) as included in the statutory enterprise are those performed for a "common business purpose". The term "common business purpose" as used in the definition does not have a narrow concept and is not intended to be limited to a single business establishment or a single type of business. As pointed out above, retailing, wholesaling and manufacturing may, under certain circumstances be engaged in for a "common business purpose". An example was also cited where retailing and construction were performed for a common business purpose. On the other hand, it is clear that even a single individual or corporation may perform activities for different business purposes. Thus the reports of the House of Representatives cite, as an example of this, the case of a single company which owns several retail apparel stores and is also engaged in the lumbering business. It concludes that these activities are not part of a single enterprise.

29 CFR § 779.213:

What is a common business purpose. Generally, the term "common business purpose" will encompass activities whether performed by one person or by more than one person, or corporation, or other business organization, which are directed to the same business objective or to similar objectives in which the group has an interest. The scope of the term "enterprise" encompasses a single business entity as well as a unified business system which performs related activities for a common business purpose. What is a "common business purpose" in any particular case involves a practical judgment based on the facts in the light of the statutory provisions and the legislative intent. The answer ordinarily will be readily apparent from the facts. The facts may show that the activities are related to a single business objective. In such cases, it will follow that they are performed for a common business purpose. Where, however, the facts show that the activities are not performed as a part of such enterprise but for an entirely separate and unrelated business, they will be considered performed for a different business purpose and will not be a part of that enterprise. The application of these principles is considered in more detail in Part 776 of this chapter.

29 CFR § 779.214:

"Business" purpose. The activities described in section 3(r) are included in an enterprise only when they are performed for a "business" purpose. Activities of eleemosynary, religious, or educational organizations may be performed for a business purpose. Thus, where such organizations engage in ordinary commercial activities, such as operating a printing and publishing plant, the business

activities will be treated under the Act the same as when they are performed by the ordinary business enterprise. However, the nonprofit educational, religious, and eleemosynary activities will not be included in the enterprise unless they are of the types which the last sentence of section 3(r), as amended in 1966, declares shall be deemed to be performed for a business purpose under the prior act and are not so considered under the Act as it was amended in 1966 except for those activities listed in the last sentence of amended section 3(r).

S. Rept. No. 145, 87th Cong. 1st Sess. 41 (1961), reprinted in 1961 U. S. Code Cong. & Admin. News, p. 1660:

Further, in order for "related activities" to be part of an enterprise they must be performed for a "common business purpose". Eleemosynary, religious, or educational and similar activities of organizations which are not operated for profit are not included in the term "enterprise" as used in this bill. Such activities performed by non-profit organizations are not activities performed for a common business purpose.

S. Rept. No. 1487, 89th Cong. 2d Sess. (1966), reprinted in 1966 U. S. Code Cong. & Admin. News, p. 3027:

In section 3(r) of the present act the term "enterprise" is defined to mean related activities performed for a common business purpose. Eleemosynary, religious or educational and similar activities of organizations which are not operated for profit are not included in the term "enterprise" since they are not performed for a business purpose.